IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 341

FLOYD A. WALLIS,

Petitioner,

versus

PAN AMERICAN PETROLEUM CORPORATION,

Respondent.

FLOYD A. WALLIS,

Petitioner,

versus

PATRICK A. McKENNA,

Respondent.

(Pan American Petroleum Corporation, Initially A Co-Defendant With Wallis)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Floyd A. Wallis, appellee below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on Jan-

uary 21, 1964, in the above cases, which involve identical or closely related questions, and which cases were consolidated in the District Court and the Court of Appeals.[1]

A. OPINIONS BELOW.

The opinion of the United States District Court for The Eastern District of Louisiana, New Orleans Division (App., *infra*, p. 101; R. p. 1847) is reported at 200 F. Supp. 468. The original opinions of the United States Court of Appeals for the Fifth Circuit (App., *infra*, pp. 113, 123; R. pp. 1978, 1989) are reported at 344 F. (2d) 432 and its opinions on petitions for rehearing filed on behalf of all parties (App., *infra*, pp. 129, 137; R. pp. 2209, 2218) are reported at 344 F. (2d) 439.

B. JURISDICTION.

The judgment of the Court of Appeals was dated and entered January 21, 1964 (App., *infra*, pp. 127, 128). A timely petition for rehearing by Wallis, appellee, was denied by order dated and entered April 21, 1965 (App., *infra*, pp. 129, 137). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), which provides[1a] that cases in the Courts of Appeal may be reviewed by this Court, "by writ of certiorari granted upon the petition of any party to any civil . . . case, . . . after rendition of judg-

[1] These cases involve two sets of facts, and in addition the Court below rendered two opinions, each based on a different predicate. In light of these considerations, every effort has been made to comply with the requirement of "brevity," as contained in Rule 23, of the Rules of this Court.

[1a] § 1254. Courts of appeals; certiorari; appeal; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal cases, before or after rendition of judgment or decree; * * *

ment or decree." While the decree below was not a final judgment, in that it remanded the cases for trial "on all issues under the applicable principles of federal law," yet under these circumstances, this Court has held that it has jurisdiction to review, and will review, where the decision of the Court below is contrary to the decision of another Court of Appeal and such decision "is fundamental to the further conduct of the case," *U.S. v. General Motors Corp.*, 323 U.S. 373, 377 (1944), and *Land v. Dollar*, 330 U.S. 731 (1947). Such is the case at bar, for the majority opinion below **concedes** the decision is contrary to the decision in *Blackner v. McDermott*, 176 F. (2d) 498 (C.C.A., 10th, 1949),[2] and, since the remand is for trial on **all** issues "under applicable principles of federal law," it is necessarily "fundamental to the further conduct of the case," particularly as respects the doctrine of "the law of the case."

C. QUESTIONS PRESENTED FOR REVIEW.

In June of 1954, Wallis filed five "acquired lands" applications seeking issuance of noncompetitive oil and gas leases on Federal lands in Louisiana, pursuant to The Mineral Leasing Act For Acquired Lands (hereafter referred to as 1947 Act).[3]

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[2] Circuit Judge Wisdom in his dissenting opinion on rehearing maintains the decision is contrary to additional decisions, *including one by the Fifth Circuit.*

[3] Act of August 7, 1947; 61 Stat. 913; 30 U.S.C.A. 351, *et seq.* As respects lands owned by the United States and the granting of oil and gas leases thereon, Congress has passed two statutes, the 1947 Act and The Mineral Leasing Act of 1920 (hereafter referred to as 1920 Act); Act of February 25, 1920; 41 Stat. 437; 30 U.S.C.A. 181, *et seq.* The distinction between the two Acts as noted (Footnotes 7 and 9, App., *infra*, p. 104) by the trial Court is: "'Acquired land,' as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual

Prior to these filings, in March, Wallis and McKenna reached an oral agreement by telephone with reference to these "acquired lands" applications, and leases to be issued "under" them, which oral agreement was confirmed by a written letter agreement (App., *infra*, p. 159) dated December 27, 1954.

Prior to Wallis having filed his "acquired lands" applications, one Henry S. Morgan had filed applications for leases **under both the 1947 Act and the 1920 Act,** purporting, in each set of applications, to describe[4] the same property as that in Wallis' applications. A contest in the Department of Interior ensued between Morgan and Wallis over the merits of their respective "acquired lands" applications, with Morgan's "public domain" application under the 1920 Act lying dormant. During the pendency of this contest, and on March 3, 1955, Wallis executed an option agreement (App., *infra*, p. 160) with Pan American Petroleum Corporation (hereafter called "Pan Am") granting it the option to acquire leases issued to Wallis "under and by virtue" of his "acquired lands" applications. Approximately a year later, in March, 1956, Wallis filed a "public domain" application for a lease on the lands under the 1920 Act, and a contest then ensued with Morgan over their respective "public domain" applications. Wal-

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and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called 'public domain land.' . . . The original Mineral Leasing Act of 1920, . . . , with certain exceptions not here relevant, applied only to public domain lands . . . Enacted to remedy this deficiency, the 1947 Act in terms applies only to 'acquired lands' not subject to lease under the 1920 statute. . ." *The trial Court further noted* (App., *infra*, p. 104) that "the parties all agree" that if lands are in fact "public domain," an application under the "acquired lands" 1947 Act is "ineffective," and, *vice versa*.

[4] The Department of Interior ultimately held the purported descriptions in Morgan's applications, to be faulty and not in compliance with the law.

lis' "public domain" application ultimately prevailed, and in December, 1958, he was issued a "public domain" lease pursuant to the 1920 Act, being Lease No. B.L.M. 042017 of the Department of Interior.

Despite the fact that the written agreements only related to the "acquired lands" applications, nevertheless separate suits were instituted by McKenna and Pan Am seeking to impress such written agreements upon Wallis' "public domain" lease.[5]

The claim sustained below is that all issues should be decided under "applicable principles of Federal law."[6] In the context of the foregoing, the questions presented for review are:

1. The extent to which the issues involving these private contracts, are governed by Federal law as opposed to local law, including the issues of (1) the formal validity of the private contracts, (2) the applicability of the Statute of Frauds, (3) the applicability of the parol evidence rule,

[5] McKenna asserted that he and Wallis were engaged in a "joint venture" to obtain leases. He joined Pan Am as a co-defendant with Wallis, because of the execution of the option agreement (App., *infra*, p. 160) with Pan Am.

[6] While the issue was not raised, nevertheless Trial Judge J. Skelly Wright considered the possibility of the applicability of Federal law but concluded the case should be decided in accordance with local law and ruled in favor of Wallis in both suits. On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law. On original hearing, the majority of the Court ruled (Judge Wisdom dissenting) that the parties' rights should be determined in accordance with Federal law and ordered a remand for trial in accordance therewith (App., *infra*, pp. 122, 128). Primary reliance was placed upon decisions of this Court dealing with disposal of Federal lands under the Public Land Laws, particularly the case of *Irvine v. Marshall*, 61 U. S. (20 How.) 558 (1858). In denying petitions for rehearing, further written opinions (Judge Wisdom dissenting) were filed (App., *infra*, p. 129), the majority concluding "that our opinion should be more closely tied to" the 1920 Act, and then held that the "policy" underlying the 1920 Act required "uniformity" in its application.

(4) what constitutes a breach thereof, (5) the substantive and operative effect of the private contracts, and (6) the equitable remedies in the event of a breach of such private contracts? For while the majority acknowledged "the right of action was created by state law," yet it remanded for trial "on **all issues** under the applicable principles of federal law,"[7]

2. The extent to which the Mineral Leasing Act of 1920 requires "uniformity" in the adjudication of all issues relative to these private contracts and precludes the applicability of local law, in light of § 32 thereof (App., *infra*, p. 96), which reads in part, as follows: " . . . Nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States," and

3. What interstitial authority or function is vested in Federal Courts by the Mineral Leasing Act, where Congress by § 32 of the Act (App., *infra*, p. 96) has delegated to the Secretary, authority "to prescribe necessary and proper rules and regulations and **to do any and all things necessary to carry out and accomplish the purposes of" the Act?**[8]

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[7] All emphasis appearing in this petition has been supplied unless otherwise noted.

[8] The more important subsidiary questions comprised in these questions for review are: (1) whether or not the owner of a Federal oil and gas lease has "rights" which constitute "property" and are thus subject to local law in accordance with past decisions of this Court and the Circuit Courts, including the Fifth Circuit? and (2) whether or not past decisions of this Court interpreting the Public Land Laws, generally, are applicable to the interest owned by a lessee under a Federal oil and gas lease?

D. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States:

Article I, Section 8, Clause 17:

§ 8.—The Congress shall have power . . . ,

> To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; * * *

Mineral Leasing Act of 1920; Act of February 25, 1920; 41 Stat. 437; 30 U.S.C. 181:

> The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 79-96.

Mining Law (30 U.S.C. 26, 28; R.S. 2322, 2326):

> The pertinent portions of this Act are set forth in Appendix, *infra*, pp. 96-99.

E. STATEMENT OF CASE.

For several years prior to 1954, Wallis was individually engaged in the oil business at New Orleans, Louisiana, and he set out to obtain leases on Federal lands in Plaquemines Parish, Louisiana. At the time, McKenna was working on another matter for Wallis before the

Department of Interior (admitted by McKenna to be in the capacity of Wallis' agent), and Wallis instructed McKenna to check the records of the Bureau of Land Management (hereafter referred to as "B.L.M.") as to a number of tracts, to see if they were "open" for leasing. During this search, Wallis decided to concentrate on one particular tract which seemed to be "open," and set about preparing five "acquired lands" applications for leases pursuant to the 1947 Act.

In March of 1954, when the five applications were ready for filing, Wallis called McKenna and reached an oral understanding with McKenna concerning the applications and leases which might issue to Wallis "under" the said applications, with McKenna to have an interest therein. This understanding "was finally reduced to writing in a letter (App., *infra*, p. 159) from Wallis dated December 27, 1954, approved by McKenna on January 3, 1955."[9] Simultaneously with the execution of this letter agreement, McKenna executed five powers of attorney[10] agreeing to act as Wallis' **agent** in connection with the five applications and these were filed with the B.L.M. In connection with this agreement with McKenna, McKenna testified that he agreed "to handle all matters here with the Department of Interior and whatever agency might be involved[11] . . . It was contemplated I would do anything necessary."[12] In fact McKenna was not an attorney-at-law and was not even qualified to practice before the

[9] District Court, App., *infra*, p. 103.

[10] Items 22 to 26, both inclusive, Wallis' Note of Evidence. These were prepared by McKenna for Wallis' signature. These documents appear in the Record as original papers.

[11] R. p. 1513.

[12] R. p. 1516.

Department of Interior, for in 1952 McKenna had specifically been denied this right.[13]

One Henry S. Morgan had filed "acquired lands" applications for leases, **prior** to the filing of Wallis' applications, purporting to describe the same property, and it was necessary for Wallis to initiate a contest in the Department of Interior with Morgan, by filing a "protest" as respects Morgan's "acquired lands" applications. Although McKenna had "agreed to handle all matters here with the Department," he could not practice there, and so he resorted to the device of prevailing upon Wallis to employ Mastin White to handle the "protest," on the representation that White was an "expert" and a "protest" was a very highly technical matter—with Wallis and McKenna to share in paying White's fee for such services. Without Wallis' knowledge or consent, McKenna told White the protest need be only "*pro forma.*"[14] The "protest" was filed by White in January of 1955, initiating the contest with Morgan.

In February of 1955, Wallis began to have discussions with A. D. Campbell, an employee of Pan Am, about the possibility of Pan Am's acquiring an option upon leases which might issue to Wallis, pursuant to his "acquired lands" applications. They arrived at the terms of an agreement, which were communicated to Percy Sandel, Pan Am's house counsel, with instructions to prepare an agreement, which he did, and it was executed on March 3, 1955 (App., *infra*, p. 160). During the confection of this transaction, Pan Am, through Sandel, had Mr. Neil

[13] Cf. Item 158 of Wallis' Note of Evidence. Original Papers.

[14] Cf. White's letter of September 6, 1955, Item 55, Wallis' Note of Evidence. Original Papers.

Stull, its Washington, D. C., attorney and expert on B.L.M. matters, check the transaction (including Wallis' contest with Morgan) at the B.L.M.

Shortly after the execution of the Pan Am option agreement, Wallis' "protest" of Morgan's applications was denied, and Wallis appealed within the Department to the Director, before whom the matter was briefed and submitted. Unbeknown to Wallis, Pan Am's expert, Mr. Neil Stull, collaborated with Mr. White on the brief submitted to the Director.[15] While the matter was still pending on appeal, Mr. White had to withdraw, and Wallis employed new counsel, Mr. Harry Edelstein, a former Assistant Solicitor of the Department of Interior. Edelstein reviewed the work done by Mr. White in connection with the appeal concerning the "acquired lands" applications, and he agreed with Pan Am's attorney, Mr. Stull, that White's work could not "be improved upon," and testified there was nothing further that he could do, or did, towards prosecuting the pending appeal. However, in reviewing the records in the B.L.M. he noted that Henry S. Morgan at the time he filed his "acquired lands" applications, had

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[15] As respects his participation, Mr. Neil Stull advised Pan Am, in part, as follows: ". . . As you are aware, Mr. Wallis is represented in Washington by Mr. Mastin G. White, and I have had a number of conferences with Mr. White relative to the case. *Mr. White has very kindly permitted me to participate in the handling of the case,* and *he has included several suggestions I have made in a brief* which he has just filed with the Director of the Bureau of Land Management in support of his protest against the allowance of the Morgan application. I have reviewed Mr. White's brief very carefully, and *I do not believe that it can be improved upon. Mr. White has adopted several suggestions I have made, and his brief meets with my complete approval. I do not believe that I could raise any points which have not been raised by Mr. White,* hence I see no reason why we should attempt to intervene in the case, at least at this time . . ." Original Exhibits, "Sandel X-3," letter dated August 4, 1955, written by Neil Stull.

also filed "public domain" lease applications under the 1920 Act, as respects the same lands. Morgan's "public domain" applications had been lying dormant, but Edelstein suggested[16] Wallis also file a "public domain" application, as a precautionary matter. This was done in March of 1956, and Edelstein filed a "protest" on behalf of Wallis as respects Morgan's "public domain" applications.

In April of 1956, Wallis disassociated himself from McKenna, and advised McKenna that he was terminating his agreement with McKenna, for reasons which need not be elaborated upon.

In June of 1956, the Director, of his own motion and without notice to the parties, consolidated the contest between Wallis and Morgan as respects the "public domain" applications, with their contest over the "acquired lands" applications, thus bypassing the initial administrative level, and he then ruled the lands in question to be "public domain" lands, rejected both Wallis' and Morgan's "acquired lands" applications, and ruled Morgan's "public domain" applications defective, holding Wallis entitled to a "public domain" lease under the 1920 Act. This decision was ultimately sustained by the Secretary of the Interior,[17] and the lease No. B.L.M. 042017 was issued to Wallis in December of 1958.

Despite the fact of the letter agreement (App., *infra*, p. 159) between Wallis and McKenna, and, the

[16] We need not burden this account with the dispute as to who discovered the Morgan applications, and, suggested Wallis file a "public domain" application—McKenna or Edelstein. The trial Court did not resolve the dispute.

[17] The Secretary's ruling was affirmed by the Court. Cf. *Morgan v. Udall*, 306 F. 2d 799, and writ was refused, 371 U. S. 941.

simultaneously executed powers of attorney where McKenna had agreed to act as Wallis' agent, plus the fact that the letter agreement was restricted to the "acquired lands" applications,[18] McKenna filed suit alleging a joint venture agreement with Wallis, seeking to utilize parol and extrensic evidence to maintain the joint venture and impose it upon the "public domain" lease held by Wallis.

The jurisdictional predicate for McKenna's suit was diversity of citizenship, he alleging in Article I of his complaint (R. p. 2), that McKenna was a citizen of Washington, D. C., Wallis a citizen of Louisiana, and Pan Am was a corporation organized under the laws of Delaware, and that "the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars." While McKenna prayed for declaratory relief, in effect he was asking for specific performance. Wallis interposed as defenses (1) a denial of a joint venture, asserting McKenna was employed as his agent,[19] (2) the local Statute of Frauds, (3) the parol evidence rule, (4) fraud and/or a failure of consideration or lack of contractual capacity, all based upon McKenna's agreement to "handle all matters here with the Department of Interior . . . It was contemplated I would do anything necessary"—when McKenna could not and did not render such services, since he was not admitted to practice before the Department.[20]

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[18] The trial Court said: "Indeed, Wallis' letter to McKenna which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest." (App., *infra*, footnote 18, p. 109.)

[19] The trial Court did not deem it necessary to decide this issue. Cf., App., *infra*, p. 103, ft. n. 4.

[20] The trial Court did not deem it necessary to decide this issue. Cf. App., *infra*, p. 111, ft. n. 24.

Despite the fact that the option agreement with Pan Am (App., *infra*, p. 160) was restricted to the "acquired lands" applications and leases which might issue to Wallis "under and by virtue of" **these applications**, Pan Am brought suit for specific performance of the option agreement, seeking to impose it upon Wallis' "public domain" lease. In attempting to maintain its claim, Pan Am (1) placed emphasis upon Paragraph II of the option agreement (App., *infra*, p. 162) and its provision concerning "diligent efforts,"[21] (2) relied upon an alleged contemporaneous conversation between Wallis and Pan Am's house counsel, Sandel, at the time of the signing of the option agreement, supposedly concerning Morgan's "public domain" applications,[22] and (3) urged some type of estoppel based upon the "diligent efforts" provision of the option agreement coupled with the assertion that Wallis

[21] The trial Court said: "Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to 'make diligent efforts' to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant. (footnote) . . . Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely 'the things concerning which * * * the parties intended to contract.' . . ." (App., *infra*, p. 107).

[22] The trial Court refused to believe Sandel, and held no such conversation took place, saying: "Though Campbell, the Pan American agent who negotiated the option 'deal' with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, inter alia, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, *including Sandel's own correspondence*, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegation must be rejected . . ." (App., *infra*, p. 109, ft. n. 18.)

did not take a definitive position before the Department as to the character of the land.[23]

The jurisdictional predicate for Pan Am's suit was also diversity of citizenship, it alleging (R. p. 195) that it was a corporation organized under the laws of the State of Delaware, Wallis a citizen of the State of Louisiana, and, that the "matter in controversy herein exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars."

Wallis defended by (1) denying that the option agreement covered his "public domain" lease, (2) asserting the local Statute of Frauds, and the parol evidence rule, (3) urging that Pan Am had not elected to exercise the option agreement in writing, as required by the Statute of Frauds, (4) asserting the option agreement was not binding, because (a) the consideration or "price" for a conveyance to Pan Am was "uncertain" since it could be altered at Wallis' option and (b) Wallis could elect to reserve an "oil payment" out of production, and there would, therefore, be no "consideration" since Wallis would be simply purporting to "reserve" what he had, and (5) interposing two defenses based upon the Mineral Leasing Act, and the regulations issued thereunder.[24]

District Judge J. Skelly Wright ruled in favor of Wallis in both cases, holding the written contracts, in

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[23] In light of the statement of its own attorney and expert, Mr. Stull, to the effect that he had participated in the prosecution of Wallis' "acquired lands" application, and appeal thereon, and "I do not believe it can be improved upon," Pan Am was never able to show where Wallis failed to make "diligent efforts."

[24] Defenses (3) through (5) were not passed upon by the district Court. Cf. footnote 24, App., *infra*, p. 111.

each instance, were restricted solely to the "acquired lands" applications and did not encompass the "public domain" lease. Moreover, Judge Wright heard **all** parol and extrinsic evidence, and held that it merely confirmed the written agreements that the parties had only intended to contract with reference to the "acquired lands" applications;[25] but Judge Wright ultimately rejected all parol and extrinsic evidence, under the parol evidence rule and the local Statute of Frauds. Despite the fact that the case was tried, argued and submitted by Pan Am and McKenna, based upon the applicability of local law, yet Judge Wright considered the question of the applicability of Federal law, but concluded that local law was controlling.

On appeal, and for the first time, McKenna and Pan Am asserted the applicability of Federal law, and the Court of Appeal reversed (App., *infra*, p. 122) Judge Wright, by a divided vote, and "remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Circuit Judge Wisdom filed a written dissent (App., *infra*, p. 123) agreeing with Judge Wright.[26] In denying petitions for rehearing, the majority handed down a further written opinion (App., *infra*,

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[25] Said the trial Judge: ". . . The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna and Pan American to the acquired lands applications." (App., *infra*, p. 109.)

[26] In view of the importance of the question involved concerning Federal-State relationship, it is noteworthy that, below, each disposition of the basic question won the vote of one circuit Judge and one district Judge.

p. 129) with Judge Wisdom filing a further written dissent (App., *infra*, p. 137).

The majority opinion, on rehearing, represented a decided shift in the predicate upon which its original opinion rested, if not a repudiation thereof. The original opinion was pitched, in the main, upon decisions by this Court relating to the disposal of **land** under the Public Land Laws, with particular emphasis placed upon the case of *Irvine v. Marshall*, *supra*. It made only a passing reference to two sections of the 1920 Leasing Act, coupled with the observation that the Act "makes it clear that, as part of the public policy . . . directed at opposing monopoly . . . the Bureau of Land Management must examine the qualifications of the real lessee and of any assignee of a mineral lease . . . Those provisions leave no room for operation of any State law."

On rehearing, when confronted with decisions by this Court dealing with the Public Land Laws, which destroyed the predicate for the original opinion, the majority "concluded that our decision should be more closely tied to that [1920 Leasing] Act," although it did not expressly repudiate the prior reliance upon the *Irvine* case, *supra*, and the other cited decisions.

F. REASONS FOR ALLOWANCE OF WRIT AND SUPPORTING ARGUMENT.

The more important reasons why the writ should be granted and allowed are these:

(1) The decision by the majority below is in direct conflict with the decision of the Tenth Circuit in the case of *Blackner v. McDermott*, 176 F. (2d) 498 (1949). **This**

conflict is conceded by the majority opinion,[27] as well as dissenting Judge Wisdom, who, in addition, maintains the decision conflicts with other decisions, including one by the Fifth Circuit.

(2) The question of Federal law decided below, is of far-reaching importance, for if it is allowed to stand, it will not only directly affect and render questionable the title of **all** outstanding Federal leases, but it will also constitute an usurpation of authority in the field of Federal-State relations (Discussed, *infra*, pp. 18-22), particularly the conclusion below, that certain provisions of the Mineral Leasing Act of 1920, "leave no room for operation of State law." (Discussed, *infra*, pp. 63, *et seq.)* This conclusion is in direct conflict with § 32 of the Act (App., *infra*, p. 96), which provides, in part, that: "Nothing in this Act shall be **construed** or **held** to affect the rights of the States . . . to exercise any rights which they may have . . . " (Discussed, *infra*, p. 22.)

(3) For the reasons given, and, authorities cited by Judge Wisdom in his dissenting opinions (App., *infra*, pp. 123, 137).

(4) It is necessary for this Court to clarify, and decide, a highly important question which results from this Court's decision in *Boesche v. Udall*, 373 U.S. 472 (1962), which decision was erroneously interpreted below, as respects the "rights" of a Federal lessee *vis-a-vis* third persons. (Discussed, *infra*, p. 59.)

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[27] Said the majority: "It appears that the district court felt that the Rules of Decision Act compelled adherence to the local law . . . *And the Tenth Circuit has followed that view* in a case . . . *Blackner v. McDermott*, 10 Cir. 1949, 176 Fed. 2d 498."

(5) The decision below, as it interprets the Leasing Act, is in conflict with the interpretation thereof by the Land Department, this Court's decision in *Hodgson v. Federal Oil and Development Co.*, 1927, 274 U.S. 15 (discussed, *infra*, p. 49), as well as a prior decision of the **Fifth Circuit itself,** in *Witbeck v. Hardeman*, 1931, 51 F. (2d) 450 (discussed, *infra*, pp. 55, 71), and also the decisions of other Circuit Courts, to-wit: *Oldland v. Gray*, 1950, 10th Cir., 179 F. (2d) 408 (discussed, *infra*, pp. 56, 71), *Alaska Consolidated Oil Fields v. Rains*, 9th Cir., 1932, 54 F. (2d) 868, *Pan American Petroleum Corp. v. Pierson*, 10th Cir., 1960, 284 F. (2d) 649, *Isaacs v. De Hon*, 9th Cir., 1926, 11 F. (2d) 943, and, *Gibbons v. Pan American Petroleum Corporation*, 10th Cir., 1958, 262 F. (2d) 852 (discussed, *infra*, p. 55, *et seq.*, p. 71, *et seq.)*.

(6) The decision below, contrary to the practice of the Land Department and contrary to the next above cited decisions, failed to apply applicable decisions of this Court relating to the Public Land Laws, generally, which was error, and hence such decision was contrary to decisions of this Court, among which are *Ducie v. Ford*, 1871, 138 U.S. 587; *Johnson v. Towsley*, 1871, 80 U.S. 72; *U. S. v. Buchanan*, 1913, 232 U.S. 72; and *Marquez v. Frisbie*, 1879, 101 U.S. 473 (discussed, *infra*, p. 33, *et seq.*, p. 40, *et seq.)*.

I. The Questions Involved Are Important.

Aside from the immediate values involved in this suit,[28] and the further fact that the majority opinion below concedes that its decision is in conflict with a decision by

[28] The trial Court (App., *infra*, p. 101) noted these suits "involve rights in a mineral lease covering about 830 acres on the oil-rich banks of Southwest Pass, . . . of the Mississippi River . . ."

the Tenth Circuit, this case involves two highly important questions. We refer, first, to the need for clarification of this Court's decision in *Boesche v. Udall*, 373 U.S. 472 (1962), particularly in light of the interpretation placed thereon by the Court below. Second, we refer to the alarming implications of the decision below, as it relates to the important question of Federal-State relations.

In the *Boesche* case, this Court noted that as of June 30, 1960, the Secretary of Interior reported that 139,000 leases were outstanding as issued under the Mineral Leasing Act of 1920, alone, and, 159,000 leases outstanding as issued under all leasing programs.[29] The decision by this Court in the *Boesche* case, as that decision has been interpreted and applied by the Court below, we submit, will have far-reaching effect, and, will necessarily result in "clouding," and rendering questionable, the titles to all such outstanding leases. For the Land Department and the decisions heretofore rendered by this Court and the Circuit Courts involving the interpretation of the Mineral Leasing Act of 1920, have consistently held, as respects the "rights" of individuals acquired pursuant thereto, that: (1) such "rights" constitute "property," and are thus subject to the law of the States as respects private transactions relating thereto, so long as local law is consistent with the fact that "legal" title to the land is vested in the United States, and, the Acts of Congress relative thereto; (2) such "rights" constitute "property" in the same sense that other inceptive "rights" acquired by individuals pursuant to the

[29] As respects the "Mineral Leasing Act For Acquired Lands," *supra*, in the petition for certiorari filed by the Government in "*United States of America v. The Leiter Minerals, Inc.*," No. 950 on the docket of this Court, October 1964 Term, the statement is made, at page 11: "There are outstanding some 400 oil and gas leases issued by the United States [in Louisiana] covering 300,000 acres of these acquired lands."

Public Land Laws, generally, constitute "property" even though the legal title is vested in the United States; and (3) the decisions and jurisprudence relating to inceptive "rights" acquired pursuant to the Public Land Laws, generally, are equally applicable to such "rights" acquired pursuant to the 1920 Act.[30]

Considering the foregoing, and the fact that the jurisprudence for forty years has sustained the applicability of local law as respects private dealings and transactions relating to such rights, it cannot be denied that many titles to leases heretofore acquired, will be placed in jeopardy and rendered subject to serious question, if at this late date the owners are to learn that such private dealings and transactions were (and are) governed by Federal law.

Furthermore, the decision below, if allowed to stand, (in the words of Judge Wisdom) "carries alarming implications," as respects the delicate Federal-State relationship and a proper regard for the legitimate functions of each. For the decision below (again in the words of Judge Wisdom) finds merely the "presence of a federal statute," plus a "policy" furthered by the statute, and then simply **concludes** that "uniformity" is **required** as respects the adjudication of all private transactions. At no place does

[30] This rule has been consistently followed by the Land Department. Cf. "Lula T. Pressey," 60 I.D. 101 (1947), at page 102: "It was well settled long prior to the passage of the Mineral Leasing Act that an entry of public land under the laws of the United States segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed. (citing cases) * * * Shortly after the passage of the Mineral Leasing Act, the same rule was held to apply to applications filed under that act . . . This rule has been followed repeatedly by the Department, both with respect to applications for permits and for leases. (citing I. D. decisions)"

the opinion demonstrate how, or why, the adjudication of such private transactions in accordance with local law in any way relates to, or has any connection with, the "policy" of the Act, or would affect the interests of the U.S. Nor does it show or demonstrate how, or why, uniform adjudication of such private rights would relate to, or have any connection with, the "policy" of the Act, or the interests of the U.S.[31]

In the final analysis, despite the fact that this Court (we think) in *U.S. v. Standard Oil Co.*, 332 U.S. 301 (1947), attempted to clarify the question of when Federal law applies, and to establish some "guide lines" relative thereto, still confusion reigns.[32] It has been treated as a "new toy" by both the lower Courts and the scholars, to say nothing of the fact (as in the cases at bar) that when all else has failed, it has become a "last straw" for the frantic lawyer. Scarcely a month goes by, that some new article is

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[31] This holding by the majority was without express consideration of, but squarely opposed to, the provision in Section 32 of the Act (App., *infra*, p. 96) which states: ". . . Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority *to exercise any rights which they may have*, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

[32] 77 Harvard Law Review 1084, "The Competence Of Federal Courts To Formulate Rules of Decision," *cites the very decision here involved*, saying: ". . . *Erie* left no doubt that the lawmaking competence of the federal judiciary is limited, but the boundaries of this competence have not yet been definitively charted. An examination of the many cases in which the issue of federal competence is involved reveals a crazy-quilt pattern of conflicting determinations among the federal circuits and within panels sitting on individual cases. For example, in their present terms of court the Supreme Court divided six to three over the applicability of federal law to tax lien priorities, the Third Circuit divided over the law governing the liability for conversion of a chattel held as security for a government loan, *and the Fifth Circuit split over the law governing the assignment of a lease of public domain land.*"

not published upon the subject, no two of which are able to reconcile the various decisions, and all ranging in opinion from rapt approbation[33] to critical condemnation,[34] of each new decision asserting controlling Federal law.

These cases, indeed, represent a startling new departure in the field of Federal-State relations. In the words of Judge Wisdom, ". . . if a federal court, in the name of interstitial lawmaking, may concoct a Law of Property, Law of Contracts, Law of Restitution, and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I foresee a fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states." (App., *infra*, p. 141.)

II. The Comprehensiveness Of The Mineral Leasing Act, And, The Need For Uniformity—As Opposed To The Proviso Of Section 32 Of The Act Reserving The Right To The States "To Exercise Any Rights" Which They May Have.

We baldly assert that the second opinion of the majority below, holding there is a need for "uniformity" in the law applicable to these private transactions, is rendered entirely in error because of the express Congressional prohibition found in § 32 of the Leasing Act (App., *infra*, p. 96), that "**nothing** in this Act shall be **construed or held** to affect the rights of the States . . . to exercise any rights which they may have . . ." The second opinion holds that the Leasing Act "represents a comprehensive scheme of federal regulation" and that this required the

[33] Cf. "In Praise of Erie—And Of The New Federal Common Law," Volume 19, The Record Of the Association Of The Bar Of The City Of New York, page 64.

[34] *Supra*, footnote 32, p. 21.

conclusion that "the interest of the United States is directly affected" by the law applicable to these private agreements. Said the majority, "uniformity" in the law applicable is required and there is no room for the applicability of local law. Yet the majority opinion does not point out wherein the applicability of local law would or might conflict with any express statutory provision, or regulation issued pursuant thereto by the Secretary of the Interior. The decision is pitched solely upon the requirement of "uniformity" which, in some obscure fashion, it relates to the "policy" of the Act.

The second opinion only referred to that portion of § 32 of the Act which grants the Secretary authority to administer the Act, and, prescribe rules and regulations to accomplish the purposes of the Act. The second opinion gives absolutely no consideration to the further proviso of § 32, above noted, and, we submit, that this provision was entirely overlooked. We further submit that this provision entirely precludes the conclusion of the second opinion.

It will be noted that this proviso is drawn in the broadest terms for it precludes not only "construction" of the Act, but in addition prohibits any **provision of the Act** from denying the rights of the States "to exercise any rights which they may have." This broad grant includes the further proviso as respects the rights of the States, as "including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States." The all-encompassing language of the entire proviso has never been interpreted by this Court. However, it has had occasion

to interpret the above quoted "included" authority to tax, in the case of *Mid-Northern Company v. Walker*, 268 U.S. 45 (1924). In that case an effort was made to restrict, by interpretation, the all inclusiveness of the "included" right to tax. However, this Court rejected such effort to limit and circumscribe the proviso, saying, p. 49: " . . . In other words, **the purpose of Congress** was to remove **altogether** from the field of controversy, **among other questions,** the very question which is here presented, and to put beyond doubt the authority of the states to impose taxes upon lessees in respect of their property, . . ., **without regard** to the origin thereof or **to the interest of the United States in the lands or leases.**"

In connection with this extract, we wish to emphasize the fact that it interprets this proviso as respects a mineral lessee, as subordinating the "interest of the United States in the lands or leases" to the exercise of local right and authority. The opinion concludes with this statement (p. 50): " . . . We think the proviso **plainly discloses the intention of Congress** that persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful." While in keeping with the questions presented, this last statement by the Court is restricted to "any form of state taxation," if we substitute for this restriction, the all-encompassing language of the whole proviso, it would read that persons and corporations holding leases under the Act "should not, for that reason, be exempt from any form of the exercise of any rights or authority of the States otherwise lawful."

What are the "rights of the States," the exercise of which, the Act shall not "be construed or held to af-

fect . . ."?[35] We need look no further than the second opinion when it says: ". . . federal law did not create the right of action . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment' —whether they be oral or arise by operation of trust—implies that we should look to the law of the state. * * * While it might be said that [these claims] constitute transactions **essentially** of local concern and that the resulting litigation is 'purely between private parties,' . . . * * * We do not think the use of these devices as a part of the scheme of carrying forth this public policy **should be limited by interstitial restrictions imposed by the law of Louisiana . . .** "

In addition to the foregoing, the second opinion says, "the action is not one under federal law in the sense that federal law did not create the cause of action," and when this is coupled with the further statement, "federal law did not create the right of action," it necessarily acknowledges that such was created under local law. Being a State-created cause of action, is not one of the "rights of the State," the right to have that cause of action and all issues, including the remedy, governed and controlled by State

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[35] Consider this proviso of Section 32 in light of what was said in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 155 (1943): "It is a much more serious thing to adopt a rule of construction, as we are asked to do here, *which precludes the execution of state laws by state authority in a matter normally within state power*. The great body of law in this country which controls acquisition, transmission, and *transfer of property, and defines the rights of its owners in relation . . . to private parties*, is found in the statutes and decisions of the state. The custom of resorting to them to give meaning and content to federal statutes is too old and its use too diversified . . ."

law?[36] We need not pause to consider the incongruity of the acknowledgment in the second opinion that the right and cause of action were State-created, with its decision that the case be remanded for trial "on **all** issues under the applicable principles of federal law." *Francis v. Southern Pacific Co.*, 333 U.S. 445 (1945), which the second opinion cites and relies upon, did not pretend that Federal law governed **all** issues in the case. A mere reading of the *Francis* case discloses that in that case recovery might have been had under local law but for Federal law, and it illustrates a situation where the "rights of the State(s)" would have precluded the applicability of Federal law, had the statute there in question contained a proviso similar to that in § 32 of the Leasing Act.

We submit that the proviso of § 32 unqualifiedly precludes the "federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interest" as respects the Leasing Act, and contrary to the holding of the second opinion in this respect.[37]

Even aside from this provision of § 32 of the Act, under the decisions of this Court the holding of the second

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[36] The State has not ceded jurisdiction over the lands in question, and when this proviso of Section 32 is considered in light of Article 1, Section 8, Clause 17 of the Constitution (*Supra*, p. 7), and, this Court's decision in *Wilson v. Cook*, 327 U. S. 474 (1945), and *Paul v. U. S.*, 371 U. S. 245 (1963), the applicability of local law to these private transactions, simply cannot be denied.

[37] In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. A., 2nd, 1962), the Court said: "Persons dealing in land within a state must conduct themselves in the light of state law, which will inevitably govern most of their relations; it would be inconvenient in the last degree if they had also to take cognizance of a Federal property law that would apply only in [a] rather rare event . . ."

majority opinion is in error. An examination of such decisions will serve to point up the enormity of the error inherent in the second opinion, all in light of this provision of § 32.

In *Radio Station WOW v. Johnson*, 326 U.S. 120, (1944), this Court held that a judgment under local law impinged upon the prerogatives of the Federal Communications Commission, by attempting to control the conduct of parties before that Commission, but said, p. 132: "On the other hand, if the State's power over fraud can be effectively respected while at the same time **reasonable opportunity** is afforded for the protection of that public interest which led to the granting of a license, the principle of fair accommodation between State and federal authority, where the powers of the two intersect, **should be observed.**" Nowhere does the second opinion demonstrate that a "reasonable opportunity is **(NOT)** afforded for the protection of (the) public interest," as respects the Leasing Act, because of the applicability by the Trial Court of "the State's power over fraud" as it is epitomized by the local Statute of Frauds.

Farmers Union v. WDAY, 360 U.S. 525 (1958), states, p. 535: ". . . But we have not hesitated to abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Here, petitioner is asking us to attribute to § 315 a meaning which would either frustrate the underlying purposes for which it was enacted or alternatively impose unreasonable burdens on the parties governed by that legislation. **In the absence of clear expression by Congress we will not assume that it desired such a result . . .**" This extract calls for a "clear

expression by Congress,"[38] and we submit that § 32 of the Act **is such** a "clear expression by Congress."[39] We, of course, do not concede that the applicability of local law to these private transactions would either frustrate the purpose of the Leasing Act, or, impose unreasonable burdens on the parties governed thereby, and nowhere does the second opinion so demonstrate.

The majority opinion cited no authority in support of its conclusion that "uniformity" is required as respects the applicability of local law to these private transactions, but **only suggested** that its conclusion be **compared** with the decision in *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U.S. 29 (1956). The holding in that case that Federal law was **not applicable** to the private transaction there involved, was summarized by this Court as follows: ". . . because the litigation between the two private parties there did not intrude upon the rights and the duties of the United States, the effect on the only possible

[38] In *Paul* v. *U. S.*, 371 U. S. 245 (1963), this Court said, at page 260: "If there had been a desire to make federal procurement policy bow to state price-fixing in face of the contrary policy expressed in the Regulation, we can only believe that the objectives of the Act would have been differently stated . . ."

[39] As to what constitutes a "clear expression by Congress," we direct the Court's attention to the recent holding by the Fifth Circuit, in an opinion *authored by the same Judge* as the two opinions below, and rendered while these cases *were pending on rehearing*. We refer to *The Leiter Minerals, Inc.* v. *U. S.*, 329 F. 2d 85 (1964), which involved a contract *whereby the United States purchased land*, said the Court, p. 89: "In addition, section 715f of the Migratory Act reads: 'No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715-715d, 715e, 715f-715k, and 715l-715r of this title *unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.*' (Emphasis by the Court.) We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable . . ."

interest of the United States—the floating of securities —being too speculative to justify the application of a federal rule. That doctrine clearly does not apply when the State fails to give effect to a term or condition under which a federal bond is issued, as the Court there noted . . ."[40] Nowhere does the second opinion point out wherein the applicability of local law to these private transactions has failed to "give effect to a term or condition" under which this federal lease was granted, nor to give effect to any provision of the Leasing Act or any regulation issued thereunder. For in the final analysis, local law as here applied, was entirely negative, in that it simply said that as a result of this private transaction, the status of this federal lease **was in no way altered.** The majority opinion did not pretend that local law as here applied, would affect the "floating" of Federal leases.

The decisions last above reviewed demonstrate the error of the holding of the majority below, aside from the express prohibition contained in § 32 of the Leasing Act.[41] We submit that this proviso of § 32 of the Act so clearly demonstrates the error of the majority below, that this Court would be justified in granting this petition, and, **immediately reversing the decision below without further proceedings.** In any event, we submit that § 32 of the Act, and, the decisions above referred to are such that a review is required in keeping with what was said in *San Diego Unions v. Garmon*, 359 U. S. 236 (1959), at page 241: "In

[40] *Free* v. *Bland*, 369 U. S. 663, 669 (1961).

[41] Added evidence of Congressional solicitude and regard for the full sway of local law is found in Section 30 of the Act, where Congress detailed certain matters which should be covered by provisions to be inserted in Federal leases, and then concluded with the provision: "That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated." App., *infra*, pp. 93, 94.

determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration . . ." This has never been done by this Court, as respects the Leasing Act, and the majority opinion below, in disregard of, and contrary to, all past decisions of this Court and those of the Circuit Courts, including the Fifth Circuit, makes absolutely no effort to discriminate between "conflicting rules of law, of remedy, and of administration." No effort is made at "delimiting areas of potential conflict," or consideration given to matters of "a merely peripheral concern." On the contrary, in one fell swoop, it wipes the slate clean of any area for the exercise of local law, by requiring the application of Federal law to all issues.

As we view the opinions below, the Court's acknowledgment that the right and cause of action here involved are locally created, thereby removes these cases from the "full sweep" of the doctrine of *Textile Workers v. Lincoln Mills*, 353 U. S. 448 (1956). Yet without so stating, it attempts to take advantage thereof, by speaking of the comprehensiveness of the Leasing Act. But this disregards several important factors. The Leasing Act, to the point of granting leases on Federal lands, is no different and no more "comprehensive" than any of the other general Public Land Laws. The only real difference results simply from the nature of the "right" granted, and more particularly the situation contemplated **after the "right"** in the Fed-

eral land **is granted.** This results from the fact that a lease is a continuing executory contract, which continuously generates rights in favor of the lessor, the United States. Thus when this Court noted, in the *Boesche* case, that the Leasing Act "has also subjected the lease to exacting restrictions and continuing supervision by the Secretary," it was speaking in the main **of the supervision of** the lessor's rights under the lease, and, of the operations conducted under the lease in accordance with the terms of the lease, all as distinguished from the **ownership of the lease itself.** On this aspect of the matter, the ownership of the lease, there is nothing "restrictive," for while an "assignment" or "sublease" must be approved by the Secretary, yet he has no discernible discretion, since under § 30 (a) (App., *infra*, p. 94), he may "disapprove" **for only two specific reasons.** This, we submit, should be contrasted with what was said in the *San Diego Unions* case, *supra*, concerning the labor laws, and more particularly the administration thereof by a "centralized administrative agency."[42]

The Public Land Laws, generally, have always provided for administration thereof, by the Secretary of the

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[42] Even in the field of labor law, in *Hamilton Foundry & M. Co.*, v. *International M. & F. Wkrs.*, 193 F. 2d 209 (C. C. A., 6th, 1951), certiorari denied 343 U. S. 966, a local Statute of Frauds was applied to a collective bargaining agreement, the Court saying, page 215: "Although the contract and federal jurisdiction to enforce it arise out of a federal statute, *the enforcement of the right must conform to the remedy prescribed by the law of the state where the action is brought.* We agree with appellant that a state statute can not change or diminish a substantive right created by a federal statute, . . . , but a state statute is applicable *where it deals with the remedy rather than with the substantive right* . . ." This decision was cited with approval in *Lincoln Mills*, but the decision in *Lincoln Mills* leaves it unclear as to whether or not this remedy would be "a merely peripheral concern of the Labor Management Relations Act," as referred to in the *San Diego Unions* case.

Interior. No special "administrative agency" is created by the Leasing Act. Yet all of the other Public Land Laws are similarly administered by the Secretary and the "policy" of Congress has been to leave to local law and local tribunals, the adjudication of **"private transactions"** had by those holding inceptive "rights" under such laws.

III. The Original Opinion Of The Majority Below And The *Boesche* Case, In Light Of Decisions Concerning The Public Land Laws, Generally, And The Decisions Interpreting The Mineral Leasing Act.

Without mention of the *Boesche* case, the original opinion (App., *infra*, p. 114) of the majority relied entirely upon decisions relating to the Public Land Laws, generally, with only a passing reference to the Leasing Act and its "policy" against "monopoly." **Not one single case was cited** which dealt with the Leasing Act. In its second opinion (App., *infra*, p. 129), it did not explicitly repudiate the predicate for its original opinion, although we submit it did so by inference, for it acknowledged that: "We have concluded that our decision should be more closely tied to that [Leasing] Act." It is apparent that the second decision utilized the *Boesche* case as a vehicle for avoiding the force and effect of decisions relating to the Public Land Laws, generally, and which demonstrated the inapplicability of those decisions originally relied upon. It is, therefore, necessary to consider the original opinion, and particularly the decisions relating generally to the Public Land Laws. This consideration serves as a predicate for an examination of the second opinion and the decisions interpreting the Leasing Act. Also it will place the *Boesche* case in proper focus.

A. The Decisions Relating To The Public Land Laws As Respects The Nature Of Inceptive Rights While The Legal Title Remains In The United States.

The decisions and jurisprudence relative to the disposition of lands pursuant to the Public Land Laws, have developed within the framework of the following propositions: (1) ". . . The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation' . . . The power over the public land thus entrusted to Congress is without limitations. 'And it is not **for the courts** to say how that trust **shall be administered.** That is for Congress to determine.' " *Alabama v. Texas*, 347 U.S. 272, 273 (1953);[43] (2) Congress has delegated authority over the administration and disposition of the public domain, to the Secretary of the Interior and the Land Department. *Best v. Humboldt Mining Co.*, 371 U.S. 334 (1962);[44] and (3) As respects such public domain, ". . . the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter **that is not consistent with full power in the United States** to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them . . ." *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 404 (1916).

[43] Cf. *Standard Oil Co. of California* v. *U. S.*, 107 F. 2d 402, 409 (C. C. A., 9th, 1939), *certiorari denied* 309 U. S. 654, 309 U. S. 673: ". . . The disposal of the public lands is not a subject over which the 'judicial power' of the United States is extended . . ."

[44] Cf. page 339: ". . . Congress has entrusted the Department of the Interior with the management of the public domain and prescribed the process by which claims against the public domain may be perfected . . ."

As respects the first two propositions above noted, we digress in order to pose these propositions, to-wit: Where is there any "duty" imposed upon the "federal courts" to see that "the equitable title as well as the legal title to public lands"[45] is properly vested? And, assuming the Leasing Act contemplates someone will "fill the interstices," where has Congress delegated authority so that "federal courts must fill the interstices"?[46] As respects both questions posed, are not these matters delegated by Congress **solely and exclusively** to the Secretary of the Interior?[47] As respects the third proposition, considering the Secretary has granted Wallis the lease, wherein is local law "not consistent with the full power of the United States," when such local law merely says that by these private transactions in light of the local Statute of Frauds, McKenna and Pan Am **have not** acquired an interest in Wallis' lease? More particularly, how does such application of local law affect or frustrate the "policy" **against** "monopolies"?

In considering the cases relating to the Public Land Laws, it should be remembered that the "policy" against

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[45] First opinion of the majority, App., *infra*, p. 116.

[46] Second opinion of the majority, App., *infra*, p. 133.

[47] Title to the land still being vested in the United States, are not such matters within the sole jurisdiction of the Secretary under Section 32 of the Act (30 U. S. C. A. 189), for he "is authorized to prescribe . . . regulations . . . and to do any and *all things necessary* to carry out and accomplish the purposes of" the Act? One premise for the decision in the *Boesche* case, was the fact that title to the land, in the case of a lease, remained in the United States, yet this Court limited the effect of the decision with this circumscribing *caveat*: "We sanction no broader rule than is called for by the exigencies of the general situation *and the circumstances of this particular case.* We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land." 373 U. S. 472, 485.

"monopoly" is not unique or peculiar only to the Leasing Act. For we do not know of a single Public Land Law (disposing of rights generally to the public) wherein this same "policy" does not inhere, for all such Acts that we have found have acreage limitations as respects permissible holdings.[48] Yet the decisions relating to such Public Land Laws, generally, hold that local law is applicable to private transactions and dealings affecting inceptive rights in "public lands," where the "legal title" is still vested in the United States. And this without any suggestion or intimation that it conflicts with the statutory "policy" against "monopolies." Furthermore, where statutory "policy" was being frustrated by private contracts relating to such inceptive rights, this Court had noted that it was Congress that has corrected the situation, rather than saying that the "policy" of the statute conferred interstitial authority upon the Courts to do so.[49]

In considering the incipient "rights" of a homesteader, *U. S. v. Buchanan*, 232 U.S. 72 (1913), held that

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[48] Cf. *U. S.* v. *Trinidad Coal & Coking Co.*, 137 U. S. 160, 166 (1890), Rev. Stat. sec. 2347, 30 U. S. C. 71, as to coal. In the homestead laws (Rev. Stat. sec. 2289; 26 Stat. 1097; 43 U. S. C. sec. 161), the timber and stone laws (20 Stat. 89; 27 Stat. 348; 43 U. S. C. sec. 311), the desert-land laws (19 Stat. 377; 26 Stat. 1096; 43 U. S. C. sec. 321), the laws pertaining to underground water reclamation grants (41 Stat. 293; 43 U. S. C. sec. 351), the Taylor Grazing Act, as it relates to homesteads (48 Stat. 1272; 43 U. S. C. sec. 315f), and the mining laws (Rev. Stat. secs. 2320, 2329, 2331; 30 U. S. C. secs. 23, 35).

[49] In *Myers v. Croft*, 80 U. S. 291 (1871), at page 295: "This was felt to be a serious evil, *and Congress, in the law under consideration*, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation . . ."

the entryman acquired the right to "treat the land as his own" though "legal title" remained in the United States, and this "right was in the nature of private property," saying, at page 77: ". . . The entry by Moore withdrew the land from entry or settlement by any other, and segregated the quarter-section from the public domain. **The legal title remained in the Government** until patent issued, but **as against all except the United States** he was the lawful possessor **clothed with an inceptive title** . . . * * * This view is sustained by the terms of the statute and **is in accord with the policy to leave the protection of such possessory claims to the laws of the several States. Congress could have legislated so as to make the statute applicable until patent issued.** But instead of doing so, it left the homesteader, who had acquired a possessory title, **to avail himself of the same rights that were open to others holding lands, by title absolute or inchoate . . .**"

In *Gauthier v. Morrison*, 232 U.S. 452 (1913), suit was instituted by a homesteader **in a State court,** seeking protection of his inceptive "right" to possession, and the State court dismissed for want of jurisdiction, since it appeared that the claim depended upon a matter assumed to be within the jurisdiction of the Land Department. In reversing, this Court held that, ". . . no interference with that [Land] department or usurpation of its functions was here sought or involved. * * * Congress has not prescribed the . . . mode in which such wrongs may be restrained and redressed . . . **but has pursued the policy** of permitting them to be dealt with **in local tribunals** accord-

ing to **local modes of procedure.**"[50] In support thereof, the cases of *Lytle v. Arkansas*, 63 U.S. (22 How.) 193 (1859), and *Black v. Jackson*, 177 U.S. 349 (1899), are cited, among others. In the *Lytle* case, this statement appears, page 205: "This slab tenement was built by Moses Austin, about 1820. On leaving Little Rock, **he sold** it to Doctor Mathew Cunningham; it passed through several hands, till it was finally **owned by** Col. Ashley. Buildings and cultivated portions of the public lands were **protected by the local laws** of the Arkansas Territory; either ejectment or trespass could have been maintained by Ashley against Cloyes to recover the premises, nor could an objection be raised by any one, **except the United States**, to **these transfers** of possession—neither could Cloyes be heard to disavow **his landlord's title.** He held possession for Ashley, and was subject to be turned out on a month's notice to quit." In the *Black* case, the local court had issued a mandatory injunction requiring an adverse possessor to remove certain improvements from a homestead claim, and, in reversing, this Court said, page 359: "What circumstances under the **laws of Oklahoma** will justify the use of a mandatory injunction for the purpose of ousting a

[50] The Court said, page 461: "Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public-land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. *But no interference with that department or usurpation of its functions was here sought or involved.* It has not been invested with authority to redress or restrain trespasses upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. *Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed,* as doubtless it could, *but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure.* And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land States, but also recognized and approved by this court . . ."

person of the possession of land and putting his adversary in possession—neither party having the legal title—is left in some doubt **by the decisions of the Supreme Court of that Territory . . .**" The Court then proceeded to note the extensive local laws dealing with possessory rights, and decided the case based on local decisions.

It is obvious from the foregoing decisions, that in the determination by State courts of private "rights" to possession of property, the legal title to which was in the United States, it was necessary for local law to be applied in resolving disputes which flowed from private transactions, such as deeds, leases, agreements to sell, and other similar types of contracts. This is made manifest from the case of *Marquez v. Frisbie*, 101 U.S. 473 (1879), when this Court said, page 475: "We did not deny the rights of the courts to deal with the possession of the land **prior to the issue of the patent,** or **to enforce contracts between the parties concerning the land . . .**" These cases illustrate the fact that as respects such incipient "rights," and even prior to the issuance of "legal title," the Courts apply local law to the private contracts concerning such rights.

Similarly, as respects the incipient "right" of a mining claim,[51] and in sustaining a **local** tax and resulting lien thereon, *Forbes v. Gracey*, 94 U.S. 762 (1876), states page 767: ". . . Those claims are the subject of bargain and sale, . . . They are property in the fullest sense of the

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[51] In *Cameron* v. *U. S.*, 252 U. S. 450 (1919), at page 460: "A mining location which has not gone to patent is of no higher quality . . . than are unpatented claims under the homestead and kindred laws. *If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims . . .*"

word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. **This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States.** Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, **be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it."** While recognizing that such incipient mining claim was "property" and thus subject to local tax law and lien, as well as vesting "the right to sell, transfer, mortgage and inherit," yet *Black v. Elkhorn Mining Co.*, 163 U.S. 445 (1896), held that local law could not impose a right of dower thereon, saying: ". . . We do not think that under the Federal staute the locator **takes such an estate in the claim that dower attaches to it.** * * * By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and **there is no condition that hampers the right to convey by encumbering it with an inchoate right of dower . . ."**[52]

And *Ducie v. Ford*, 138 U.S. 587 (1890), **affirmed the application of the local Statute of Frauds** to the assertion of a "trust" on property held under a mining patent, which asserted "trust" was predicated upon an oral agreement made with the patentee **prior to issuance of the patent**

[52] Similarly, *McCune* v. *Essig*, 199 U. S. 382 (1905), held that the incipient "right" of a homesteader, who died prior to the issuance of a patent, would not vest in his widow in accordance with local community property law, but such right would devolve in accordance with the Act of Congress. However, *Buscher* v. *Buscher*, 231 U. S. 157 (1913), held that upon issuance of a patent to a homesteader, the title so vested in the patentee as community property under local law.

by the United States.[53] **Ducie cannot be distinguished from the cases at bar.**

The foregoing cases dealing with the "rights" acquired by private individuals in "public lands," disclose that such "rights" are "property," even though the "legal title" to such lands are still vested in the United States. They further demonstrate that local law governs private contracts and transactions relating to such inceptive "rights" and thus may operate **indirectly** or incidentally on such "rights" by governing such transactions, all so long as local law is: (1) consistent with the "legal title" being vested in the United States, (2) is not contrary to, or in conflict with, an Act of Congress, and (3) does not purport to operate **directly** upon the legal title to the land or attempt **directly** to regulate or vest legal title to the land. **But most important,** they clearly show that such operation of local law, does not **frustrate, interfere with or affect,** the "policy" of the various statutes as opposed to "monopolies."

B. Decisions Relating To The Public Land Laws As Respects The Equitable Power Of The Courts And The Application Of Federal Law.

The decisions by this Court disclose that the equitable powers of Federal Courts, whereby they apply Federal law, only extend to **reviewing** matters which transpired before, or were initiated before, the Land Department. And in exercising this power, it could only recognize "equit-

[53] In *Williams* v. *U. S.*, 138 U. S. 514 (1890), *decided on the same day* as the *Ducie* case, this Court said, at page 522: "This brings us to the final contention: . . . and *that the government pays no attention to private disputes between parties who have transactions in respect to public lands before it parts with its title, . . . * * * In the main, we do not doubt these propositions of law; . . .*" We will consider this case in more detail hereafter.

able rights" which had **originated with, or had been presented to, and been denied by, the Land Department.**

The leading case on this subject, is *Johnson v. Towsley*, 80 U.S. 72 (1871), where the Court said, at page 85: ". . . if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, **and by the laws which Congress has made on the subject,** it ought to go to another, 'a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . ."[54] We cannot emphasize too strongly, the statement from this extract, that the equitable power will operate "when, in equity and good conscience, **AND** by **the laws which Congress has made on the subject,** it ought to go to another . . ."[55] Thus it is not alone sufficient, that a party

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[54] The Court said, page 85: ". . . So also the register and receiver, . . . , often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, *and by the laws which Congress has made on the subject,* it ought to go to another, "a court of equity will,' . . . , 'convert him into a trustee of the true owner, and compel him to convey the legal title.' . . ."

[55] This rule was summarized in *Recio*r v. *Gibbon*, 111 U. S. 276, at page 290, as follows: ". . . , the jurisdiction of courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appeared that the party claiming the equity *had established his right to the land upon a true construction of the acts of Congress*, and by *an erroneous construction* the patent had been issued to another, the court would correct the mistake . . ."

may be **seeking** an equitable remedy, but he **must also show** that "by the laws which Congress has made" the property "ought" to go to him. Here McKenna and Pan Am cannot show that by any law of Congress, the lease ought to have been awarded to them by the B. L. M. rather than to Wallis. McKenna and Pan Am took absolutely no steps to obtain the lease from the B. L. M. in accordance with the Act of Congress, but they claim only through private contracts made with Wallis,[56] **who was the only one who** sought and obtained the lease "by the laws which Congress has made on the subject."

The foregoing principle of *Johnson v. Towsley*, was elaborated upon more fully in the case of *Marquez v. Frisbie*, from which we quoted *(supra*, p. 38). In the *Marquez* case, the Court pointed out the circumstances under which an action at law will lie, and also when a court of equity has jurisdiction, holding the patent was conclusive in courts of law, as respects matters which transpired before the Land Department prior to issuance of the patent. But as respects a court of equity, the Court said, page 476: **". . . But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions,** and in

[56] In *Oldland* v. *Gray*, 179 F. 2d 408 (C. C. A., 10th), *certiorari denied* 339 U. S. 948, where the plaintiff sought to impose an "equitable trust" on a Federal oil and gas lease, the Court said, at page 412: ". . . *Federal law did not create this asserted cause of action, nor is it an essential element thereof* in the sense that the cause of action will be sustained if federal law is given one construction or effect, and defeated if given another. The asserted rights of the parties *arise out of a private contract*, and they must stand or fall upon its construction or effect . . ." In *Manuel* v. *Wulff*, 152 U. S. 505, 511 (1894), in speaking of the inapplicability of the Federal mining statute, to a conveyance of a mining location, this Court said: ". . . his claim passed to his grantee, not by operation of law, *but by virtue of his conveyance* . . ."

cases where it is clear that these officers [of the Land Department] have **by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another**, to give appropriate relief.' *Moore v. Robbins*, 96 U.S. 530, 535; *Shepley v. Cowan, supra; Johnson v. Towsley, supra.*" [57]

In accordance with the foregoing is *St. Louis Smelting and Refining Company v. Kemp*, 104 U.S. 636, holding that equity could not afford relief, if the plaintiff could not "connect himself with the original source of title . . . (and) aver that his rights are injuriously affected **by the existence of the patent.**"[58] On the other hand, the case of *Marquez v. Frisbie, supra*, while acknowledging that Courts

[57] The derivative of the Court's power and authority to judicially review matters which transpire before the Secretary, as respects his disposition of the "legal title," is as stated in *Standard Oil Co. of California* v. *U. S.*, supra, at page 410: ". . . If Congress has clothed the Secretary with general authority to administer the grant, and *if his decision of fact in this instance was made within the scope of such authority*, there can be no doubt that his decision is conclusive on the courts, *in the absence*, at any rate, *of fraud or imposition* . . . Of course, in order to give conclusive effect to his decision, the Secretary's power in the premises *must be exercised within the limits of due process*, . . ."

[58] Cf. page 647: ". . . The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, *a court of law can afford no remedy* to a party alleging that he is thereby aggrieved. *He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title*, so as to be able to aver that *his rights are injuriously affected by the existence of the patent;* and he must possess such equities as will control the *legal title in the patentee's hands. Boggs* v. *Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of *a stranger to the title to complain of the act of the government with respect to it.* If the government is dissatisfied, *it can, on its own account*, authorize proceedings to vacate the patent or limit its operation." See also: *Steel v. St. Louis Smelting and Refining Company*, 106 U. S. 447, 454, and *Bohall v. Dilla*, 114 U. S. 47 (1884).

could "deal with the possession of land" prior to patent, and "enforce contracts between the parties concerning the land," yet it had this to say, page 475. "And we think it would be quite as objectionable to permit a State Court, while such a question was under the consideration and within the control of the executive department, to take jurisdiction of the case by reason of their control of the parties concerned, and render decree in advance of the action of the government, **which would render its patents a nullity when issued.**" Since a State Court could not do this, necessarily a State Legislature could not by law, attempt to operate **directly** upon the title to the land, prior to patent, and "render (the) patents a nullity when issued." This was the purport of the Statute involved in the case of *Irvine v. Marshall,* 61 U.S. (20 How.) 558, and it is only to this extent that ***Irvine*** is competent authority, and the foregoing decisions disclose the error of the first opinion in applying it to the facts here involved, and, in accepting it as controlling.[59]

It was the rule announced in the foregoing cases (and some discussed hereafter) which required the majority of the Court below to retreat from (if not abandon) the predicate for the original opinion. This it did in an

[59] Additional reasons why the *Irvine* case is not controlling here, are: (1) the Statute involved was not a Statute of Frauds, for the case was before the Supreme Court on a demurrer, and the decision upon remand (Cf. *Irvine* v. *Marshall and Barton*, 7 Minn. 286, 1862) discloses there was a written contract involved; (2) the "legal title" to the land was still vested in the United States, whereas here the "title" to the lease has been given by the Land Department to Wallis; (3) *both parties* in the *Irvine* case were asserting inceptive "rights" to the land involved; and (4) the "legal title" to the land being in the United States and thus the matter being within the jurisdiction of the Land Department, the foregoing cases disclose that the Federal court had no more authority to decide "title," or, purport to vest "title," by imposing an "equitable trust," than did the State court.

obscure fashion in the second opinion, when (App., *infra*, p. 131) it said: "It should be noted that the actions before the district court, and before this Court on appeal, **do not seek to overturn the decision of the Secretary awarding the lease to Wallis.** McKenna and Pan American **were not applicants who competed with Wallis** before the Secretary. Indeed, it is evident that McKenna and Pan American supported Wallis's claim to the Secretary that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of 'competing claimants,' the Secretary's decision **would be subject to judicial review** only if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes 'public lands' was erroneous as a matter of law. E. g., *Morgan v. Udall*, D.C. Cir. 1962, 306 F. (2d) 799."[60]

The foregoing discloses the extent to which a Federal court could apply Federal law, under the Public Land Laws generally, as respects "equities" asserted by a third person, where such "equities" originated **prior** to the severance of the "legal title" from the United States. These cases disclose that it is only where such "equities" originate in proceedings before the Land Department—where the parties are "competing claimants," that the Federal Courts might

[60] In light of the foregoing decisions *by this Court*, which were cited to the Court below, it is ironical that the majority opinion chose to cite *Morgan* v. *Udall* in support of this statement. Wallis was a party to that suit, along with the Secretary of the Interior, and the suit by Morgan sought judicial review of the Secretary's *award to Wallis of the very Federal lease here involved*. The decisions above cited disclose that Morgan's suit is the *only instance* where a Federal court of equity might have jurisdiction to apply Federal law, and, impose an "equitable trust" on the "title" to a Federal lease after issuance by the Secretary. For Morgan's claim *originated with* the Land Department and he had initially sought the lease (adversely to Wallis) *from and before* the Land Department. Morgan *was not* (as are McKenna and Pan Am) claiming the lease *by and through* Wallis, as are McKenna and Pan Am.

adjudicate under Federal law. On the other hand, if such "equities" do not so originate, but only originate prior to issuance of "legal title" and from a private contract or dealing with the **only one** having inceptive "rights," then the "equities" are governed by "local law," in that local law governs his rights and remedies as respects such private transactions.[61]

That such jurisdiction of a Federal court to apply Federal law **does not extend** to private transactions and contracts had with one **who is the only party** dealing with the Land Department, is clearly demonstrated in the case of *Williams v. U.S., supra.* There Williams made a "desert-land" entry, and then purported to "sell" eighty acres thereof by warranty deed for $5,000.00, and the "purchasers" spent approximately $60,000.00 in erecting a quartz mill thereon. It was apparent that Williams then devised a scheme to defraud the "mill owners" and he did not do the required reclamation work, but relinquished and cancelled his "desert-land" entry. At the same time he set about obtaining title thereto through the State, since the State was entitled to select the lands under an appropriate Act of Congress. The "legal title" was granted the State, and Williams then acquired from the State. The Court set aside the transfer by the Secretary to the State because of "inadvertence and mistake," occurring in the Land Department, which had resulted in the Secretary's approving the State's selection list. This "mistake" **did not**

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[61] We submit the same law is applicable to the cases at bar, for the asserted rights of both McKenna and Pan Am originate from private contracts with Wallis, entered into prior to the issuance of the lease to Wallis. They did not claim "adverse" to him before the B. L. M., but now claim through and under Wallis, and as the Trial Court held, such contracts *did not even deal* with the application for the lease which ultimately issued.

relate to Williams' private transaction with the "mill owners," but the Court recognized the overwhelming "equities" in favor of the "mill owners," resulting from their private contract with Williams, and his conduct[62] in attempting to defraud them. In answer to Williams' argument, that the "legal title" had properly vested in the State in accordance with the Act of Congress and that the "government pays no attention to private parties who have transactions in respect to public lands before it parts with its title," the Court said: "In the main, we do not doubt these propositions of law." However, the Court noted that had the "equities" in favor of the "mill owners" been called to the attention of the Secretary, since the law required his approval of the selection list, he would have been justified in declining to certify the list, saying at page 524:

> ". . . **It (the statute) gives the power to the Secretary to deny this application of the State,** and refuse to approve its selection, and hold the title in the general government until, within the limits of existing law or by special Act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government."

In connection with this holding, these propositions should be noted: (1) The Court held that the Secretary had the "power" (not the "duty") to consider the "equities" aris-

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[62] We remind the Court, that there is no finding of fact, in the case at bar, that Wallis attempted by scheme or artifice to defraud the plaintiffs under the contracts here involved, but assuming, arguendo, that such was the case, local law provides an adequate remedy, as noted by both Judge Wright and Judge Wisdom, each of whom was trained in the Civil Law which prevails locally.

ing from this private transaction; (2) it did not suggest that the equity power of the Court was such, **that under Federal law,** the private contract with Williams would permit the imposition of an "equitable trust" upon the "legal title" held by Williams;[63] and (3) on the contrary, it held that the Land Department might hold the "legal title" in the "government until, within the limits of existing law or by special Act of Congress," the "mill owners" would be able "to obtain title from the government." But more important still, is the holding that under the Act of Congress the Secretary had been granted the "power" to take cognizance of the "equities" arising from this private contract and transaction. For such grant of "power" by Congress to the Secretary, completely negatives and precludes any authority or jurisdiction in the Federal courts over such "equities," whether as a court of equity, or, interstitially under Federal law.

These cases, we submit, demonstrate conclusively, that Federal courts have no jurisdiction to apply Federal law to such private transactions. The Secretary has the "power" to consider such "equities", but where he has not done so, or does not choose to, the parties are relegated to local law. As heretofore noted[64] as respects inceptive rights, the "policy (is) to leave the protection of such possessory claims to the laws of the several States, . . . , it (the statute) left the homesteader . . . , to avail himself of the same rights that were open **to others holding lands, by title absolute or inchoate . . .**" As we shall show hereafter, the Secretary has done just that.

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[63] As heretofore noted, this decision was handed down *on the same date,* as *Ducie v. Ford.* Cf. *supra,* p. 39, for comment and comparison.

[64] Cf. *U. S. v. Buchanan, supra,* p. 35.

C. Decisions Relating To And Interpreting The Mineral Leasing Act, Are Contrary To The Decision Below.

As heretofore noted, the Land Department, in administering the Mineral Leasing Act, has applied and followed the cases and decisions relating to the Public Land Laws, generally,[65] as respects inceptive "rights" acquired under the Act. Furthermore, the Land Department has expressed the opinion[66] that Federal oil and gas leases "vested the lessees with a property right and estate for years in real property," that this rule so adopted "was said to be 'consistent with the purpose and intent of the leasing law' * * *, a holder of a . . . lease has an immediate leasehold interest in all of the land subject to the lease . . ." The decisions of the Courts in interpreting and applying the Leasing Act, are entirely consistent with this position of the Land Department.

One of the first decisions construing the Act, was the case of *Hodgson v. Federal Oil & Development Co.*, 274 U.S. 15 (1927). In the Court below, Wallis asserted that this decision was controlling in his favor. However, the second opinion of the majority held (App., *infra*, footnote 7, p. 137) that: "We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states." We submit this holding is in error, and that the case does, in fact, support the position of Wallis. Before considering the position of the majority, and the

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[65] *Supra*, footnote 30, p. 20.

[66] Opinion by the Solicitor of the Department of the Interior to the Assistant Secretary of Interior, dated January 12, 1945, 59 I. D. 4.

Hodgson case, these matters should be borne in mind, to wit: (1) *Hodgson* was a suit in equity, (2) it was decided in the "pre-*Erie*-pre-*Guaranty Trust Co. v. York* era," and (3) **the rule** of *Johnson v. Towsley*, that courts of equity would impose a "trust" on the "legal title," when "in equity and good conscience **AND** by the laws which Congress has made on the subject, it (the "legal title") ought to go to another . . ."

The *Hodgson* case arose in Wyoming and Hodgson was attempting to impose an "equitable trust" upon a lease issued to the oil company pursuant to § 18 (App., *infra*, pp. 80-81) of the Leasing Act. Of importance is the fact that § 18 was **a special "relief" provision** of the Act designed to fit a particular situation, and, afford relief to those whom Congress considered had suffered a hardship as a result of the "withdrawal order" of the President issued September 27, 1909.[67] Sec. 18 provided that those who were in possession prior to July 3, 1910 under claims (pursuant to the pre-existing placer mining law) to any oil and gas bearing land incorporated in the "withdrawal order," and if still in possession (undisputed prior to July 1, 1919), they would, upon surrender of their rights (under certain conditions and within a delay), be entitled to the issuance of a lease. Of particular importance as respects these cases, is the fact that § 18 **specifically provided** that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, con-

[67] In the *Boesche* case, *supra*, the Court said, page 480: "Public lands valuable for their oil deposits had been opened to entry as placer mining claims by the Act of February 11, 1897, 29 Stat. 526. In 1909, confronted with a rapid depletion of petroleum reserves under this system, the President issued a proclamation withdrawing from further entry pending the enactment of conservation legislation upwards of 3,000,000 acres of land in California and Wyoming . . ."

tract, or otherwise, as their interest may appear."[68] Hodgson was claiming that he owned an undivided interest in the placer mining claim, which the oil company had surrendered and in return for which it received the lease issued under § 18 of the Act. Hodgson asserted two predicates for his recovery, to-wit: first, he asserted that he came within the above quoted provision of the Act, and, second, he asserted his grantors were co-owners of the placer claim with the oil company, and that, being co-owners, a resulting fiduciary relationship was established between them, and such relationship forbade a co-owner from acquiring and asserting an adverse title. The Court found that the co-tenancy accrued at different times and by different instruments purporting to convey the full title to the claim.

As respects the assertion that Hodgson was entitled to recover under the Act, after pointing out that he had

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[68] **We ask the Court to give particular consideration to this quoted provision.** It *does not apply* to leases issued *generally* under the Act, but it *only applies* to leases issued under this *special and restricted section.* It should be noted that were this provision applicable generally to the Act, it would cover and include the precise situation here involved. McKenna and Pan Am are claiming the lease issued to Wallis, *not* (as the majority concedes) as "competing claimants" before the B. L. M. but (to employ the language of this special provision) "through and under Wallis) by . . . contract, or otherwise." The majority below, of course, did not hold *this provision* applicable to the cases at bar, since it was a *special provision.* But the holding of the majority is to the effect, that Congress intended that this very provision *be supplied to the Act generally*—through the process of "federal courts must fill the interstices"! ! ! The majority said: "Whether the lease from the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law." (App., *infra*, p. 116). **This express provision of the Act is restricted in its application by Congress, but the majority now says that Congress intended the Courts should supply this provision and make it applicable to the Act generally.**

not complied with the Act, the Court applied the rule of *Johnson v. Towsley.*[69] We submit, that in disposing of this phase of the case, the Court applied Federal law to **the extent permissible,** and, thereby disposed of the only contention asserted **to which Federal law was applicable.** But in any event, it should be observed that the Court applied to the Leasing Act, cases which dealt with the Public Land Laws, generally, and more particularly it treated the matter as though the "legal title" to the lease had vested.

On the second phase of the case, having to do with the question of a fiduciary relationship resulting from cotenancy, we submit that, the Court was sitting and functioning as any Federal court of equity would have, in a diversity case during the "pre-*Erie*-era." In disposing of the question, the Court noted that the rule relative to fiduciary relationship between co-tenants did not apply if, "the interests of the cotenants accrue at different times, under different instruments, and neither has superior means of information respecting the title." In support of this rule, which it called an "exception," it cited a decision by that Court and several decisions by the Supreme Courts of various States, and concluded by saying: "We know of

[69] The Court said, page 19: ". . . The Oil and Development Company did not obtain *what otherwise would have been granted to them;* and the principle under which the patentee was declared trustee for another in such cases as *Silver* v. *Ladd,* 7 Wall. 219, and *Svor* v. *Morris,* 227 U. S. 524, *does not apply. Anicker* v. *Gunsburg,* 246 U. S. 110, 117, holds: 'In order to maintain a suit of this sort the complainant *must establish* not only that the action of the Secretary *was wrong in approving the other lease,* but that the complainant *was himself entitled to an approval of his lease,* and *that it was refused to him because of an erroneous ruling of law by the Secretary.*'"

no opinion by the courts of Wyoming to the contrary."[70] It was this last statement, Wallis submits, which constituted an acknowledgment by the Court, that it was bound to follow local law, and, would have done so, if there had been a local decision from Wyoming (the situs of the property) on the question. This being the era preceding the "doctrine of abstention," and while in the pre-*Erie*-era, nevertheless under the doctrine of *Swift v. Tyson,* local decisions controlled and applied "to rights and titles to things having a permanent locality, such as rights to real estate." **This very doctrine was recognized and applied by the Fifth Circuit** in a decision handed down while the case at bar was pending on rehearing, which decision was authored by the same Judge **who wrote the two majority opinions below.** *The Leiter Minerals, Inc., v. U. S.*, 329 F. (2d) 85 (C. C. A., 5th, March 3, 1964).[71] As respects the holding in *Leiter,* with reference to applying local law to trans-

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[70] The Court said, page 20: ". . . This exception to the general rule is recognized in *Turner* v. *Sawyer,* 150 U. S. 578, 586; *Elder* v. *McClaskey,* 70 Fed. 529, 546; Freeman on Co-Tenancy and Partition, § 155; *Shelby* v. *Rhodes,* 105 Miss. 255, 267; *Sands* v. *Davis,* 40 Mich. 14, 18; *Joyce* v. *Dyer,* 189 Mass. 64, 67; *Steele* v. *Steele,* 220 Ill. 318, 323. We know of no opinion by the courts of Wyoming to the contrary."

[71] In *Leiter,* the Court said, page 90: ". . . While this is not a diversity case controlled by the Erie doctrine (Erie R. Co. v. Tompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188), the rules of decision act always has had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character.' Swift v. Tyson, 1842, 41 U. S. (16 Pet.) 1, 18, 10 L. Ed. 865. *As to such matters, in the absence of a controlling decision by the highest court of the State,* we should be guided by the best evidence available . . ."

actions involving real estate,[72] the Court said: ". . . in the absence of a controlling decision by the highest court of the State, we should be guided by the best evidence available." We submit that this is precisely what the Court meant in the *Hodgson* case when it said: "We know of no opinion by the courts of Wyoming to the contrary." In *Clearfield Trust Co. v. U. S.*, 318 U.S. 363 (1942), and as respects *Swift v. Tyson*, this Court noted, page 367: ". . . And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law **rather than a choice of a federal rule designed to protect a federal right,** . . ." In *Hodgson* the Court was concerned with a placer mining claim and the law applicable thereto, for it was that which gave rise to the lease, and the majority below conceded that a mining claim "was property in the fullest sense of that term." Thus being "property" and admittedly subject to local law, why would this Court in *Hodgson* have had occasion to fashion "federal law" with reference to a mining claim? In the case of *Ducie v. Ford, supra*,[73] **the sole question presented,** was the applicability of the local Statute of Frauds, where the plaintiff was attempting to assert an oral agreement with reference to a mining claim, and thus impose an equitable trust **after** the patent issued. Applicability of the local Statute was affirmed by this Court.

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[72] In *U. S. v. Certain Property, etc.*, 306 F. 2d 439 (C. C. A., 2nd, 1962), the Court said, page 444: ". . . Even the celebrated opinion, now rejected, upholding the power of Federal courts to disregard state decisional law in certain areas, recognized that state law should be looked to as regards 'rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature,' Swift v. Tyson, 16 Pet. 1, 18, 41 U. S. 1, 18, 10 L. Ed. 865 (1842) . . ."

[73] The *Ducie* case cannot be distinguished from these cases at bar.

We submit that it was error for the majority to characterize *Hodgson*, "as fashioning a federal law of fiduciary relationship . . .", and *Hodgson* is controlling in favor of Wallis.

In the case of *Witbeck v. Hardeman*, 51 F. (2d) 450 (1931),[74] **decided by the Fifth Circuit,** the Court was concerned with a mere permit to prospect for oil, issued under the Leasing Act. During the course of that decision and in considering the Leasing Act, it was stated that: ". . . a lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent."[75] While, in affirming, this Court rested its decision solely on the ground that the Secretary had properly awarded the permit, it did not take occasion to repudiate the statements made by the Fifth Circuit in its opinion.

In the case of *Alaska Consolidated Oil Fields v. Rains*, 54 F. (2d) 868 (C. C. A., 9th, 1932), the Court held that one who held an oil and gas prospecting permit issued under

[74] Affirmed *Hardeman* v. *Witbeck*, 286 U. S. 444 (1931).

[75] The opinion contains these statements: ". . . Under the Leasing Act the land of the United States is not to be conveyed by patent, but leased, so that the proprietary interest of the United States in the land never ceases. Nevertheless, *the lease is the final action of the Land Department in disposing of the land, and in this respect is analogous to a patent* . . . Furthermore, *since a mere permit* to prospect for oil or gas under 30 USCA § 221, *is exclusive*, . . ., with a preference right to lease the whole land . . ., *the permit may be of as much value and importance as the lease which it controls. The permit is itself an act of the Land Department, final so long as it lasts, and though in its inception a mere license conveying no estate in the land, it is a final grant of a valuable right pursuant to law which ought to be secured to the person to whom the law gives it . . . It is true that neither lease nor permit ends the interest of the United States in the land involved . . . But looking at the substance of the matter, we think that the disposition of the land has already been made by the action of the Secretary in issuing a permit on the terms fixed by the law and the regulations . . .*"

the Leasing Act, had "such an interest in the land" that it would be subject to a mechanic's lien for labor under the laws of Alaska."[76] As noted, this holding was **based solely** on cases relating to inceptive rights under the placer mining act.

Blackner v. McDermott, 176 F. (2d) 498 (C. C. A., 10th, 1949), **was admitted by the majority below to be contrary to its decision.** There the plaintiff, as is McKenna, was asserting a "joint venture" for the acquisition of a lease, and by virtue of the alleged "joint venture" attempting to impose an "equitable trust" upon the lease issued under the Leasing Act, and the Court stated, page 500: ". . . Jurisdiction of the Court resting upon diversity of citizenship, **and the action not being one under federal law,** the relationship of the parties each toward the other in respect of the leasehold estate **must be determined by the law of Wyoming . . .**" We have heretofore noted the case of *Oldland v. Gray, supra*, where the plaintiff held a prospecting permit issued under the Leasing Act, which he assigned, but under which he reserved an overriding royalty on the lease to be issued. In a suit to impress a trust upon the production obtained under the lease, the Court said, page 412: **". . . Federal law did not create this asserted cause of action, nor is it an essential element thereof** . . . The asserted rights of the parties **arise out of a private contract,** and they must stand or fall upon its construction or effect . . ."

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[76] The Court said, page 874: *"In view of the decisions with reference to the inchoate rights of a locator under the placer mining laws before discovery, and the analogous but more definitely determined rights of a locator who has acquired a prospecting permit, . . . We hold that he is an owner of an interest in the land* within the meaning of the laws of Alaska under consideration, and *that his interest therein is subject to a mechanic's lien,* without prejudice to the rights of the government."

While the case of *Pan American Petroleum Corporation v. Pierson*, 284 F. (2d) 649 (C. C. A., 10th, 1960), certiorari denied 366 U.S. 936, was a suit to enjoin officials of the Land Department, yet the Court treated a lease issued under the Leasing Act as being entirely analogous to a patent to land.[77]

The foregoing review of the jurisprudence relative to the Leasing Act, discloses that those who hold "inceptive rights" under the Leasing Act, as well as leases themselves, have and own a "property right" as respects third persons, and that the Land Department had granted the "legal title" thereto. Aside from the specific holding that State law governs private contracts with reference thereto, these cases treat the holders of such "rights" as being entirely analogous to those who hold such "inceptive rights" under the Public Land Laws, where the "legal title" is vested in the United States. This Court in the *Hodgson* case, applied the rule of *Johnson v. Towsley* with reference to a lease issued under the Leasing Act, and that rule proceeds on the assumption that a "legal title" had issued from the United States, and, we submit that, if that be true, then it is "property" as vested in Wallis, and, being "property," the "legal title" to which has been conveyed by the United States, then necessarily it is "property" subject to local

[77] The Court said, page 654: ". . . This rule is said not to be applicable in the instant case because upon the issuance of a patent title passes from the United States to the patentee whereas under the Mineral Leasing Act the United States retains legal title. * * * We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land . . . Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas UNDERLYING THE LEASED PREMISES. SIMILARLY THE ISSUANCE OF A PATENT IS THE LAST ACT OF THE GOVERNMENT IN DISPOSING OF THE NON-MINERAL LANDS OF THE PUBLIC DOMAIN . . ."

law, at least as respects private transactions relating thereto.

On the other hand, if because it is **only a lease**, where the United States has not parted with the title to the land and because the Secretary continues to administer the lessor's rights under the lease—if these factors are such that the decisions above noted with reference to the Public Lands Laws **are not applicable** as respects Wallis' private transactions with third persons, then we are forced to ask where does the Federal court get or acquire jurisdiction to decide these cases under any law? For this very acknowledgment requires the holding that the matters are still within the jurisdiction of the Land Department, and it is the Secretary (not the Courts) who has jurisdiction under the Congressional grant of authority to administer Public Lands and the Leasing Act. In *Williams v. U.S., supra,* the Court said the Secretary had the "power" to consider "equities" flowing from a private contract made with one who had an inceptive "right" to land, while the "legal title" was in the United States, and the Secretary could withhold the title. However, we submit that the Secretary has not deemed it expedient or wise to involve the Land Department in such "private transactions," and has seen fit to leave the parties to the local courts and local law. For Land Department involvement would not further its **primary function** of supervising the Public Domain and the disposing of "legal title," which of itself is a task of sufficient magnitude.[78]

[78] *Best v. Humboldt Mining Co., supra,* footnote 8, page 339, noted the magnitude of the work imposed upon the B. L. M. as respects mining-claim cases, saying: "In the fiscal year 1961 there were a total of 27,228 mining-claim adjudication cases closed during the year. These included 7,457 title-transfer cases (e. g., patent applications and land-disposition conflicts), and approximately 20,000 mining-claim investigations by the

Considering the foregoing jurisprudence, and its treatment of "rights" held under the Leasing Act as being similar to inceptive "rights" held under the Public Land Laws, generally, it necessarily follows that many titles to Federal leases have been acquired and dealt with on the basis of this analogy, and, on their holding that local law governs private transactions relating thereto. It is submitted that if the decision below is allowed to stand, and such titles have always been subject to a yet undefined Federal law, then many such titles have been put in jeopardy and rendered subject to question.

D. The *Boesche* Case As It Relates To Private Transactions Had By A Federal Mineral Lessee With Third Parties, Does Not Support The Decision Below.

The majority opinion on rehearing, as above noted, devoted considerable space to what this Court said in the *Boesche* case, concerning the nature of the "right" held by a lessee under the Leasing Act. While the majority did not so state, it is quite apparent that it relied on the language of the *Boesche* decision, to avoid the force and effect of the decisions above cited with reference to the Public Land Laws, generally, and, of course, those specifically interpreting the Leasing Act. We submit that this was an unwarranted and erroneous interpretation of that decision.

([78] cont'd) Bureau's mining engineers for the purpose of determining validity or invalidity . . ." In the *Boesche* case, notice was taken of "the magnitude and complexity of the leasing program conducted by the Secretary," and reference (footnote 13) made to the fact that: "In many instances there are multiple applications for leases of the same land, sometimes hundreds for the same tract. For example, in a one-month period in 1961 there were 10,742 applications filed in the Santa Fe Land Office alone, many of which affected the same acreage . . ."

In the first place, and most important, the *Boesche* case **did not** involve a question of a Federal lessee's "rights" as respects a private transaction with third parties. That case involved **solely** the relationship and rights of a lessee as respects the United States. The cases above cited which dealt with the nature of the inceptive "rights" under the Public Land Laws, generally, and which acknowledged that such "rights" were "property" as respects third persons, at the same time, specifically **excepted** the United States. Thus *U.S. v. Buchanan, supra*, stated: "but as against **all except the United States** he was . . . clothed with an inceptive title." The sole question involved in *Boesche* was the administrative authority of the Secretary to cancel a lease for administrative error in its issuance.[79] That this was true, and that this was the sole question decided, is the fact that this Court was careful to point out, that: "We **hold only** that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases . . ."

We submit, that in deciding this narrow question, this Court did not hold, nor intend to hold, that a lessee under the Act **had less** rights, or that the "rights" which he had were less in the nature of "property," than those who held inceptive "rights" under the Public Land Laws generally, all as respects dealings with third persons. As we read the decision, the burden was in showing that the lessee's "rights" fell in the same category as those who

[79] It is significant to note the comment in *Boesche* as respects *Pan American Petroleum Corporation v. Pierson*, supra, viz.: "Because of *a seeming conflict* in principle between (this case), and *Pan American Petroleum Corporation* v. *Pierson* . . . , we brought (this) case here." No further mention was made of that decision.

held inceptive "rights" under the other Acts, rather than being in the category of one who held a patent to the land.

Thus the Court pointed out that the Secretary has such administrative power of cancellation "with respect to other **kinds of interests in public lands,"** and said: "no matter how the **interest conveyed** is denominated the true line of demarcation is whether as a result of the transaction 'all authority or control' over the land has passed . . . or whether the Government continues to possess some measure of control over them." These statements do not deny, but on the contrary affirm, that such inceptive "rights" are "kinds of interests in public lands" and acknowledge that such "rights" are an "interest conveyed." And the foregoing cases demonstrate that such "rights" are "property" as respects third persons. Hence, when this Court said that, 'a mineral lease does not give the lessee anything approaching the full ownership of a fee patent, nor does it convey an unencumbered estate in the minerals," it did not deny, nor, we submit, intend to infer, that such lessee did not have a "right" which was in every sense "property,"[80] in the same sense that other inceptive "rights" are treated and considered as "property."

The very lease[81] which the Secretary issued to Wallis states: "Section 1, **Rights of lessee**—The lessee is **granted the exclusive right and privilege** to drill for, mine, extract, remove and dispose of all the oil and gas deposits,

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[80] Section 17 of the Leasing Act (30 U. S. C. A. 226), as amended in 1935, speaks of "lease owner." App., *infra*, p. 80.

[81] Item 120, Wallis' Note of Evidence. Original papers.

. . . in the lands leased, . . . for a period of 5 years, and so long thereafter as oil or gas is produced in paying quantities . . . ," and it further states: "Sec. 8. **Heirs and successors-in-interest.**—It is further agreed that each obligation hereunder shall extend to and be binding upon, and **every benefit shall inure to, the heirs, executors, administrators, successors, or assigns** of the respective parties hereto."[82] We ask the Court to compare the foregoing, with the language of the initial mining act (App., *infra*, pp. 96-99) of May 10, 1872, c. 152 § 3 and § 5, 17 Stat. 91, 92; R. S. § 2322 and § 2326; 30 U. S. C. A. 26, 28, which provides in part as follows: "Sec. 26. The locators of all mining locations . . . , **their heirs and assigns**, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and all of the veins, lodes . . . ," and "Sec. 28 . . . On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed . . . each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed . . . until a patent has been issued therefor . . . and upon a failure to comply with these conditions, the claim . . . shall be open to relocation . . . , provided that the original locators, **their heirs, assigns, or legal representatives** have not resumed work . . ." It was this language of the statute and more particularly the references to "heirs and assigns," that served as the basis for acknowledging that mining claims "are subjects of bargain and sale, . . . and the right to sell, transfer, mortgage and inherit is recognized by the courts." Cf. *Forbes v. Gracey*, *supra*, and *Black v. Elkhorn Mining Company*, *supra*. Yet as noted heretofore (*supra*, footnote 51, p. 38), "A mining

[82] Section 28 of the Leasing Act (30 U. S. C. A. 185) speaks of "lessee, assignee or beneficiary" of a lease.

location . . . is of no higher quality . . . than are unpatented claims under homestead and kindred laws."[83]

We submit that the *Boesche* case did not render inapplicable to the "rights" of a lessee, the decisions relative to inceptive "rights" under the Public Lands Laws, generally, nor did it intend to relegate such "rights" of a lessee to any inferior or different status. And to the extent the opinion below on rehearing so interpreted it, such opinion was in error.

IV. The Majority Opinion Below On Petitions For Rehearing And The Devices Of "Assignments" And "Options."

The second majority opinion makes these statements: "We deal with claims that are, in essence, an alleged 'option' and an alleged 'assignment,' but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is sufficient

[83] In *Boesche*, while noting that a mineral lease "does not convey an unencumbered estate in the minerals," it referenced to *footnote* 7, saying: "In contrast, compare the interest of a mining claimant whose location is perfected." Yet the above statement, that it is "of no higher quality . . . than are unpatented claims" generally, and, *Black* v. *Elkhorn Mining Company, supra*, disclose there is no contrast. Moreover, in an opinion rendered by the Solicitor to the Assistant Secretary of Interior, dated January 12, 1945 (59 I. D. 4), these statements appear, pages 6, 10: ". . . Accordingly, despite some similarity, prior to discovery, in the characteristics of a lease and a prospecting permit—such as their both being subject to cancellation for cause—it was concluded that leases were, in effect, of a more permanent nature and *vested the lessees with a property right and estate for years in real property*. The rule adopted was said to be 'consistent with the purpose and intent of the leasing law.' * * * . . . On the other hand, a holder of a noncompetitive lease has *an immediate leasehold interest in all of the lands subject to the lease for* 5 years and a preference right to a new lease thereof prior to discovery and the right, without more, immediately upon discovery, to produce and sell any oil or gas produced . . ."

federal interest for the substantive independence of the federal court . . . * * * It might be said that the absence of a congressional definition of 'option' and 'assignment' —whether they may be oral or arise by operation of trust —implies we should look to the law of the state. But we are impressed by the fact that the [Act] represents a comprehensive scheme of federal regulation. Besides the policy directed at opposing monopoly . . . , Congress has recently expressed concern over a potentially dangerous slackening in exploration for development of domestic reserves . . . * * * It is clear that the [Act] recognizes the devices of 'assignments' and 'options' as concomitants to the public policy against monopoly . . . and . . . the public policy towards development . . . and increasing our domestic reserves." The foregoing is the essence of the predicate upon which the second opinion concluded that "the interest of the United States is directly affected" by these private transactions, and, that "this is an area for uniformity."

Several quick observations are suggested. As respects the failure of the Act to define "the terms 'assignment' and 'option' "—is this not a matter for the Secretary, under his delegated authority to administer the Act?[84] Considering the fact (as stated in the *Boesche* case) that in the debates in Congress concerning the Leasing

[84] As respects the Leasing Act, and definition of terms used therein, *California Company* v. *Udall*, 296 F. 2d 384 (C. C. A., D. C., 1961), says, page 388: "An administrative official charged with the duty of administering a specific statute has a duty to determine as an initial and administrative matter the meanings of terms in that statute." If the Secretary thought that the defining of the terms "assignment" and "option" in some way furthered, or were material to, the "policies" which the majority finds present, it was his province to do so. Yet the Secretary has not seen fit to define these terms, thus indicating that private contracts of "assignment" or "option," do not "directly affect" the interest of the United States, and are therefore immaterial to the "policies" of the Act.

Act "conservation through control was the dominant theme," and the further fact that the term "assignment" was in the original statute enacted in 1920—how could "recent concern . . . expressed by Congress" in 1960 over our "domestic reserves," have any bearing upon the original use of the word "assignment"?

The above quoted extracts from the second majority opinion, must be considered in the following context: Wallis, and Wallis alone, applied to the B. L. M. for the issuance of the lease, and, the lease was granted to him. At that time, and in connection with the issuance of the lease, the Secretary is presumed to have given consideration to all "policy" matters, and he is presumed to have concluded that the "policies" of the Act would be furthered by the issuance of the lease. In this light, the lease issued to Wallis. These suits seek a forced transfer of all or a portion of this lease. Local law has not said, and does not say, that transfers cannot, or could not, be made by Wallis to either of these plaintiffs. Local law does not prohibit or interdict transfers of Federal leases. Local law has simply said, in line with its public policy as reflected by the local Statute of Frauds, that the **particular private transactions** these plaintiffs had with Wallis, did not accomplish a transfer of the lease. Under these circumstances, how can it be said the "policy" of the Act is frustrated by this **negative** action of local law? Where does this "affect the interests of the United States"? How does uniformity in the decision of these transactions further the policy, or, lack of uniformity frustrate the policy? The majority gives no answers to these specific questions, it gives only general conclusions. But in the final analysis, if "uniformity" in these matters is deemed essential, is not this the province of the Secre-

tary? And is not his failure to take steps to require "uniformity" in these transactions, by appropriate regulations, evidence of his decision, and conclusion, that "uniformity" is not required?[85]

A. Section 30 Of The Act Relative To The Secretary's Approval Of Assignments Or Subleases, As Interpreted By The Decision Below, Is Contrary To Past Decisions Interpreting The Leasing Act, And, Is Contrary To Sec. 30 (a) Of The Act.

The second opinion, in stating that these suits deal with a claim that is, "in essence, . . . an alleged 'assignment', but which, ultimately, must be **approved** by . . . the Secretary," is completely in error, and fails to give proper consideration to § 30 (a) (App., *infra*, p. 94) of the Act. Thus "assignments" of Federal oil and gas leases are **no longer governed** by § 30 of the Act, **insofar as discretionary authority** of the Secretary is concerned, as distinguished from merely an **administrative function.** This is manifest from the Committee Report to Congress[86] concerning the proposed 1946 amendment, which added § 30 (a) to the Act. This states, p. 4: "Section 30 (a) is added to the Mineral Leasing Act. This section is designated **to apply to oil and gas leases only,** and **to except such leases from sec-**

[85] In *Hill* v. *Williams and Liddell*, 59 I. D. 370 (1947), as respects a dispute arising out of *a private contract with a lease owner*, this statement is made, page 375: ". . . Moreover, the dispute between Hawkins on the one side and Liddell and N. S. Williams on the other side, each charging the other party with having breached the terms of their agreement of August 21, 1944, is a matter which could and should more appropriately be settled either between the parties or by suit in the courts, rather than by this Department . . ."

[86] Report of the Committee on Public Lands, to the House of Representatives; on "Amending The Mineral Leasing Act Of February 25, 1920, As Amended," Report No. 2446, 79th Congress, *2nd Session*, H. Repts., 79-2, vol. 7-98.

tion 30 which will then apply to leases of minerals **other than oil and gas.** The section is designed to relieve the Department of the Interior of considerable administrative detail in approving assignments of leases and should eliminate much of the delay now incident to assignments or other transfer of leases." Here then is the clear expression of the intent of Congress that § 30 of the Act does **not apply** to the lease here involved, in light of § 30 (a), yet the opinions below relied, in the main, upon the erroneous assumption that § 30 applied, and the fact that an "assignment" of a lease "must be approved by . . . the Secretary."

As the Act was originally enacted, there was no specific statutory circumscribing of the Secretary's authority as respects the requirement of § 30 that: "No lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior." (App., *infra*, p. 93). In *Williams v. U. S.*, *supra*, the Court, in speaking of the requirement of a statute that the certification after selection of lands by a State "be approved by the Secretary" said: "It gives him no mere arbitrary discretion . . ." Thus the **original requirement** of § 30 of the Act, that an assignment or sublease of a lease must be approved by the Secretary, gave him no "arbitrary" discretion, but his action must have had a reasonable relation to the interests of the United States, the furtherance of the policy of the Act, and, an efficient administration of the Act. It should be noted that the Secretary's authority, as respects assignments and subleases, was "negative" in that he could only **refuse to approve,** he could not **require or force** an assignment or sublease of a lease. However broad the Secretary's authority and discretion may have been under § 30, as respects such required "approval", we submit that it has been entirely

circumscribed, by the addition in 1946, of § 30 (a) of the Act, which provides in part: "Sec. 30. (a) Notwithstanding anything to the contrary in section 30 hereof . . . The Secretary shall disapprove the assignment or sublease **only** for lack of qualification of the assignee or sublessee or for lack of sufficient bond." (App., *infra*, pp. 94, 95). Considering the fact that the Act gives the **right** to "assign" a lease, and the Secretary may **only** disapprove **for these two restricted reasons,** we are forced to ask, where is there any interstitial authority?[87] We submit that by the addition of § 30 (a) to the Act, the sole consideration or relevancy which an "assignment" has to the "policy," as respects "monopolies," or, "domestic reserves," has to do with the question of the extent of the "acreage holdings" of the proposed assignee. This is specifically provided for in § 30 (a), and this completely refutes the holding of the second major-

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[87] It is interesting to note that when the previous "broad discretion of the Secretary as respects "approval" under Sec. 30 as originally enacted, was to be narrowly circumscribed by the proposal of Sec. 30 (a), the Secretary apparently had no apprehensions about the "policy" of the Act suffering. This is disclosed by proceedings in Congress, when the 1946 Act was before the House, for final action after being reported by the joint committee, to-wit: "Mr. Fernandez. Mr. Speaker, this bill, S. 1236, as now approved by the conferees . . . * * * The second of these amendments did not meet with the full approval of the Department. The amendment *was intended to facilitate the assignment of leases in order to relieve the bottleneck in the Department of the Interior,* which has created a backlog of unapproved leases and which necessarily tends to impede and delay discovery of new petroleum reserves. The Department was *fearful that assignments could be so conditioned as to relieve assignees from some of the obligations of the original lessee, and to fully safeguard the Government and to meet the criticism of the Department,* the conferees on the part of the House drafted an amendment providing that upon approval of any assignment, the assignee must be bound by the obligations of the lease to the same extent as if he were the original lessee. This latter amendment was approved by the Department and was accepted by the Senate conferees and is now incorporated in the amendments." 79th Congress, 2nd Session, Vol. 92 Congressional Record, page 10222 (1946).

ity opinion. In the Congressional comment last noted, we direct the Court's attention to the statement, to-wit: "and to **fully safeguard the Government** and to meet the criticism of the Department,"—does not this completely negative interstitial authority?[88]

Even as respects § 30 of the Act, prior to the 1946 addition of § 30 (a), the decisions interpreting § 30 did not attach any "policy" consideration to the requirement of "approval" by the Secretary, as the second majority opinion **now asserts** even with § 30 (a) added to the Act.

As a preface to a consideration of the decisions on this phase of the Act, we should first like to consider the case of *Manuel v. Wulff*, 152 U.S. 505 (1894). This case concerned the "policy" of the mining statute, of restricting the benefits of the statute to "citizens" as opposed to "aliens." That was a contest over a mining claim, both parties claiming they had validly located the claim. It developed that defendant Manuel's claim had been initially located by his brother and he had in turn conveyed the claim to Manuel, who was an alien. The lower court held that since Manuel was not a "citizen" at the time of the purported conveyance to him, such purported conveyance amounted to an abandonment of the location by the grantor. In reversing, this Court said, page 511: ". . . , we are of the opinion on this record that, as Alfred Manuel [the brother] was a citizen, if his location was valid, his claim

[88] The Committee Report referred to, *supra*, p. 66, fn. 86, discloses in connection with the proposed § 30 (a), that the Secretary of the Interior was complaining (p. 7) because it limited the Secretary's discretion to "disapprove" assignments "for good cause." And the foregoing statement to the House, by Rep. Fernandez, shows that Congress clearly intended to deny the Secretary any "discretion," as respects approval of assignments.

passed to his grantee [defendant], not by operation of law, **but by virtue of his conveyance,** and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, **open to question by the government only."** Here then is a case of the "policy" of the statute being given consideration and "effect," in a case involving a private transaction relating to an inceptive "right," and **this Court reversed,** holding the Act has no application to this private transaction, and that the "policy" is a matter for the government to enforce.[89] Such has been the rationale of the decisions relating to § 30 of the Leasing Act.

In one of the first cases under the Act, the same question was presented, where the plaintiff was attempting to enforce a "grubstake" agreement made with the grantee of an oil permit issued under the Leasing Act. The agreement was made prior to the issuance of the permit, but enforcement by "equitable trust" was sought, as respects the issued permit. We refer to *Isaacs v. De Hon,* 11 F. (2d) 943 (C. C. A., 9th, 1926). Defenses were asserted that (1) plaintiff did not allege he was a "citizen," and (2) "permits," under the regulations, could only be assigned with the consent of the Secretary. The Court rejected both defenses, holding the question of alienage could

[89] As respects the "policy" toward "aliens" which inheres in the Public Land Laws generally, "Bank of America," 59 I. D. 412, 414 (1947), contains this statement: "It is the general policy of the laws relating to the disposition of public lands and interests therein that aliens shall not be favored with participation in the bounty thus to be obtained from the United States. This pervading policy is to be found, for example, in the homestead laws . . . , the timber and stone laws . . . , the desert-land laws . . . , the laws pertaining to underground water reclamation grants . . . , the Taylor Grazing Act as it relates to the grazing of stock in grazing districts . . . , and the mining laws . . . It finds expression also in section 1 of the Mineral Leasing Act, . . ."

only be complained of by the sovereign, and, while it might be that plaintiff would "lose the fruits of this litigation by the refusal of the Secretary to approve the assignment," nevertheless the Court would hold defendant "to the obligations in his grubstate contract."

In *Witbeck v. Hardeman, supra,* the same defense was asserted as respects the required Secretary's approval of an assignment, and the Court said, page 453: ". . . This restriction on transfer applies to voluntary transfers, and will hardly be deemed applicable in case of death, bankruptcy, or **court decree.** But the difficulty is met by the just assumption that the Secretary intends that leases and permits shall go to those whom the law entitles to them, and when a transfer is ordered to accomplish this his consent is to be implied, and may be compelled if refused. If such a transfer be decreed, he will no doubt, on request, enter his consent thereto, and make necessary substitution of bond, and do all else that is appropriate to perfect the transfer . . ." While this Court affirmed on other grounds *(supra,* p. 55) by ruling on the merits, it does seem that if it considered the foregoing ruling to be incorrect, it would have so noted. *Alaska Consolidated Oil Fields v. Rains, supra,* quoted the foregoing extract from the *Witbeck* case, with approval. In *Gibbons v. Pan American Petroleum Corporation,* 262 F. (2d) 852 (C. C. A., 10th, 1958), the Court said, page 854: "The fact that the lease assignments were unapproved by the [B. L. M.] is of no moment, since the assignee could not avoid their obligations by simply not offering them for approval," citing *Blackner v. McDermott, supra,* and *Oldland v. Gray, supra,* the latter case stating at page 415: ". . . As we have said, the rights of the parties here do not arise out of the federal act. They

have their genesis in and derive their vitality from an agreement between the parties, which unless contrary to declared public policy, are enforceable in accordance with its terms and conditions and applicable law . . ."

The foregoing decisions interpreting § 30 of the Act, are entirely in accord with this Court's holding in *Manuel v. Wulff*, *supra*, and it and the foregoing cases stand for the propositions that (1) private contracts or transactions concerning these "rights," are not governed by the Act, nor the policy thereof, (2) as respects the Act and its "policy," the Government's rights or interests are to be asserted by the Secretary and when such private contracts are submitted for his approval, and (3) none of these cases attaches any importance or significance to § 30 of the Act, and its requirement of approval of "assignments," as respects such private contracts or transactions, which stand on their own merits as contracts.

We submit that the foregoing discloses that the second majority opinion was entirely in error, as respects the significance it attached to the use of the word "assignment" in the Act, and the further requirement of approval of "assignments" as provided in § 30. Since the Act does not even require filing of "options" with the Secretary, much less his "approval" thereof, but only requires semi-annual filings by the optionee giving certain data as respects all "options" held by such optionee (Cf. Sec. 27 of the Act, App., *infra*, p. 92), the foregoing cases are even more decisive as respects the "importance" attached by the majority to the reference, or provision in the Act, concerning "options."

B. Recognition By The Leasing Act Of "Options" As Concomitants To The Public Policy Against Monopoly.

The second opinion merely lumps together "assignments" and "options" as "concomitants of the public policy against monopoly" and makes absolutely no distinction between these two devices. Yet the history of the Leasing Act, and more clearly the circumstances which brought about the first legislation in 1946 with reference to "options", discloses that there is a vast difference between "options" and "assignments" insofar as the Leasing Act is concerned.

In referring to "options" as concomitants to the "public policy" against "monopoly," this can be considered as true only by treating it in its broadest sense. **Yet**, we submit that, when "options" are considered in light of the circumstances and background that brought about legislative regulations thereof, the majority opinion is in error as to the significance which it attaches thereto.

There is an excellent article[90] by one of the leading authorities in this country on "public lands," which, together with an opinion of the Solicitor to the Assistant Secretary of the Interior,[91] reflects the history behind the 1946 amendment to § 27 of the Leasing Act (Act of August 8, 1946). Briefly summarized, these authorities are to the following effect: Originally § 27 of the Leasing Act provided that "no person, association or corporation, shall take or hold at one time oil or gas leases or permits exceeding in the aggregate" a certain limited number of acres of

[90] "Oil And Gas Leases On United States Government Lands," Ross L. Malone, Jr., 2nd Ann. Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, page 309, 324, *et seq.*

[91] 59 I. D. 4 (1945).

land in any one State. The Land Department held that acreage included in prospecting permits covered by operating agreements would not be charged against the operator, as respects the acreage limitations of the Act. The issuance of prospecting permits was eliminated in 1935, and in lieu thereof, the Act provided for issuance of noncompetitive leases on lands not within a known producing structure. Initially this attitude as respects prospecting permits was applied to noncompetitive leases until 1938, when the Department ruled that an operating contract with reference to such a lease would be charged against the operator's acreage holdings (letter to LeRoy H. Hines, dated April 19, 1938, 1708342, "L" MB). In order to avoid and circumvent the effect of this ruling, the scheme was devised of taking options to acquire leases upon their issuance on the theory that this was not an interest in real estate, and would, therefore, not be charged against the acreage holdings of the optionee. There was no official ruling from the Department but reports indicated that there were conflicting opinions among the officials thereof as to the chargeability of options under § 27 of the Act. Considerable sums of money had been invested by the industry in "options", designed, primarily, to permit the optionee to go upon land and conduct geological and geophysical exploration, and, with, of course, the right to ultimately acquire a lease from the holder thereof.

It was in recognition both of the evasiveness of the device of "options," and, the huge sums invested therein, that brought about Congressional recognition of "options" in the 1946 amendment (App., *infra*, p. 82) to Sec. 27 of the Act, and, with **an acreage limitation thereon,** when taken for the purpose of geological or geophysical

exploration, such permissible holding of "options" not to count against the acreage limitation on holdings of leases. Besides limiting the term of an "option" to two years without the approval of the Secretary, the Act did not require that "options" be filed with, or approved by, the Secretary, but only that an optionee should file a sworn declaration, semi-annually, with the Secretary, giving certain data with reference to **all options** held by the optionee within each respective State, which data was to include the number of acres covered by each "option". It will thus be seen that the recognition and regulation of "options", was primarily brought about as a means of buttressing the provisions of the Act imposing acreage limitations on control of leases, and, at the same time, facilitating geological and geophysical exploration of lands.[92]

We wish to impress upon the Court the fact that the Act did not require the filing of option agreements with the Secretary, much less his approval (except as to a term in excess of two years), but, only required the furnishing of certain data, concerning all options so held. We submit that to the extent that options could be said to be a "concomitant" of the "policy" of the Act as opposed to monopolies, the foregoing discloses that the Congressional recognition of the device of "options" in no way requires the conclusion of the majority below that "uniformity" is necessary in the law applicable to such agreements. We

[92] The Committee Report to Congress, on the proposed 1946 Amendment to Sec. 27 of the Act (*supra*, p. 66, fn. 86) has only this comment, with respect to the reference to "options", P. 3: "Modern technology of the industry is recognized by permitting the taking of nonrenewable options for geological or geophysical examinations of prospective areas, such options being limited to a duration of 2 years and to an area of not more than 100,000 acres in any one state. Adequate provision is made for semi-annual reporting of such options held by each optionee . . ."

submit that there is less reason in this respect, for the conclusion so reached, than in the case of "assignments" of leases, and, we further submit that, we have adequately demonstrated the error of the second opinion in its similar conclusion as respects "assignments."

G. CONCLUSION.

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, MURRAY F. CLEVELAND, hereby certify that a copy of the foregoing Petition For A Writ of Certiorari, was served upon Counsel of Record in the Court below, representing Respondent Patrick A. McKenna, and, representing Respondent Pan American Petroleum Corporation, by enclosing each such copy in envelopes, duly addressed to each such Counsel of Record at his post office address, with the required air mail first class postage prepaid and affixed thereto, and depositing same in the United States Post Office at New Orleans, La., on this ..... day of July, 1965.

MURRAY F. CLEVELAND, Counsel of Record for Petitioner.

APPENDIX.

Additional Statutes Involved.

1. Mineral Leasing Act of 1920:[1]

(Act of Feb. 25, 1920; 30 U.S.C. 181, et seq.)

Sec. 1 That deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (36 Stat. 961), and those in incorporated cities, towns, and villages and in national parks and monuments, those acquired under other Acts subsequent to February 25, 1920, and lands within the naval petroleum and oil-shale reserves, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities. Citizens of another country, the laws, customs, or regulations of which deny similar or like privilege to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

The United States reserves the ownership of and the right to extract helium from all gas produced from lands

[1] Wallis' oral agreement with McKenna, was had in March 1954, and this was confirmed by letter agreement in Dec. of 1954. The option agreement with Pan Am was in March, 1955. *Unless otherwise noted,* these provisions of the Act are set forth as they read, at the time of these agreements. Only Sec. 27 was amended by the Act of Aug. 2, 1954 and it is set forth prior to, and, after this amendment.

leased or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof. (30 U.S.C. 181.)

Sec. 17 (as amended by Act of Aug. 21, 1935) * * *

Any lease issued after August 21, 1935 under the provisions of this section, except those earned as a preference right as provided in section 14 of this title, shall be subject to cancelation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancelation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 31 of this Act. (30 U.S.C. 226.)

Sec. 18 (as originally enacted). That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed

prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: Provided, * * *

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases

hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear; subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: Provided, * * * (30 U.S.C. 227.)

Sec. 27 (as amended by Act of Aug. 8, 1946) No person, association, or corporation, except as herein provided, shall take or hold coal, phosphate, or sodium leases or permits during the life of such leases in any one State, exceeding in the aggregate acreage two thousand five hundred and sixty acres for each of said minerals; and no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease

or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however*, That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised within two years after the passage of this Act. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said date (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of

acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device perma-

nently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Acts of June 1, and June 3, 1948) No person, association or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State; and no person, association, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one

hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued),

or any interest therein, when taken for the purpose of geological or geophysical exploration, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitation provisions of any section of this Act. No such option shall be entered into after June 1, 1946, for a period of more than two years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than one hundred thousand acres in any one State: *Provided, however,* That nothing in this section shall be construed to invalidate options taken prior to June 1, 1946, and on which such geological or geophysical exploration has been actually made, and which are exercised on or before August 8, 1950. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates (1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this

Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 27 (as amended by Act of Aug. 2, 1954) No person, association, or corporation, except as herein provided, shall take or hold coal or sodium leases or permits during the life of such lease in any one State, exceeding in the aggregate acreage five thousand one hundred and twenty acres for each of said minerals: *Provided*, That the Secretary of the Interior may, in his discretion where it is necessary in order to secure the economic mining of sodium compounds leasable under this Act, permit a person, association, or corporation to take or hold sodium leases or permits for up to fifteen thousand three hundred and sixty acres in any one State. No person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate forty-six thousand and eighty acres granted hereunder in any one State, except that in the Territory of Alaska no person, association, or corporation, except as herein provided, shall take or hold at one time oil or gas leases exceeding in the aggregate one hundred thousand acres granted hereunder; and no person, association, or corporation shall take or hold at one time phosphate leases or permits exceeding in the aggregate five thousand one hundred and twenty acres in any one State, and exceeding in the aggregate ten thousand two hundred and forty acres in the United States. No person, association, or corporation shall take or hold at one time any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease or leases, permit or permits, under the provisions hereof, which, together with the area embraced in any direct holding of a lease or leases, permit or permits, under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a cor-

poration or corporations holding a lease or leases, permit or permits, under the provisions hereof for any kind of minerals hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee or permittee under this Act. For the purpose of this Act, no contract for development and operation of any lands leased hereunder, whether or not coupled with an interest in such lease, nor any lease or leases owned in common by two or more persons, shall be deemed to create a separate association under this section between or among such contracting parties, or the persons owning such lease or leases in common, but the proportionate interest of each such person shall be charged against the total acreage permitted to be held by such person under this Act: *Provided*, That the total acreage so held in common by two or more persons shall not exceed, in the aggregate, an amount equivalent to the maximum number of acres of the respective kind of minerals allowed to any one lessee or permittee under this Act. The interest of an optionee under a nonrenewable option to purchase or otherwise acquire one or more oil or gas leases (whether then or thereafter issued), or any interest therein, shall not, prior to the exercise of such option, be a taking or holding or control under the acreage limitations provisions of any section of this Act. No such option shall be entered into for a period of more than three years, without the prior approval of the Secretary of the Interior, and no person, association, or corporation shall hold at one time such options of more than two hundred thousand acres in any one State. Each holder of any such option shall file with the Secretary within ninety days after the 30th day of June and the 31st day of December in each year a statement under oath showing as of said dates

(1) name of optionor and serial number of lease or application for lease, (2) date and expiration date of each option, (3) number of acres covered by each option, and (4) aggregate number of options held in each State and total acreage subject to said options in each State. If any interest in any lease is owned or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this Act, the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the lease owner may be found, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition. Nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal or to increase the acreage which may be acquired or held under section 17 of this Act: *Provided*, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same. Except as in this Act provided, if any of the lands

or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form a part of or are in anywise controlled by any combination in the form of an unlawful trust, with the consent of the lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. (30 U.S.C. 184.)

Sec. 28. Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Goverment lands in the vicinity of the pipe line in such proportionate amounts as the

Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands under this Act that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding. (30 U.S.C. 185.)

Sec. 30. That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease

shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare; Provided, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. (30 U.S.C. 187.)

Sec. 30. (a) Notwithstanding anything to the contrary in section 30 hereof, any oil or gas lease issued under the authority of this Act may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this Act, and any assignment or sublease shall take effect as of the first day of the

lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this Act of the assignee or sublessee to take or hold such lease or interest therein. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond: *Provided, however*, That the Secretary may, in his discretion, disapprove an assignment of a separate zone or deposit under any lease, or of a part of a legal subdivision. Upon approval of any assignment or sublease, the assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee, any conditions in the assignment or sublease to the contrary notwithstanding. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; and such segregated leases shall continue in full force and effect for the primary term of the original lease, but for not less than two years after the date of discovery of oil or gas in paying quantities upon any other segregated portion of the lands originally subject to such lease. Assignments under this section may also be made of parts of leases which are in their extended term because of production, and the segregated lease of any undeveloped lands shall continue in full force and effect for two years and so long thereafter as oil or gas is produced in paying quantities. (30 U.S.C. 187a.)

Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: Provided, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. (30 U.S.C. 189.)

2. Mining Law:

(30 U.S.C. 26, 28; R.S. 2322, 2326)

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges

shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. R.S. § 2322.

§ 28. Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such

claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coowners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by this section. On all such

valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922. R.S. § 2324; Feb. 11, 1875, c. 41, 18 Stat. 315; Jan. 22, 1880, c. 9, § 2, 21 Stat. 61; Aug. 24, 1921, c. 84, 42 Stat. 186.

DISTRICT COURT OPINION

Patrick A. McKENNA, Plaintiff,

v.

Floyd A. WALLIS and Pan-American Petroleum Corporation, a corporation, Defendants.

PAN AMERICAN PETROLEUM CORPORATION, Plaintiff,

v.

Floyd A. WALLIS, Defendant.

Civ. A. Nos. 8904-B, 8937-B.

United States District Court
E. D. Louisiana,
New Orleans Division.

Dec. 26, 1961.

WRIGHT, District Judge.

These cases involve rights in a mineral lease covering about 830 acres on the oil-rich banks of Southwest Pass, one of the mouths of the Mississippi River, around the community of Burrwood in southernmost Louisiana. The common defendant, Wallis, holds his lease from the United States. He did not come by it without a fight.[1]

[1] The history of his contest with Morgan, a prior applicant before the Department of the Interior, is a long one. There was an initial skirmish over the "acquired lands" filings, which Wallis lost. Then the terrain shifted to the "public domain" applications and Wallis succeeded in obtaining a preliminary ruling voiding Morgan's prior filing for technical defects. But Morgan did not acquiesce in defeat. An elaborate rehearing before the Director of the Bureau of Land Management delayed his final decision another year. Failing in that, Morgan ap-

Nor is his title yet secure.[2] But even if his triumph be short-lived, Wallis wants to enjoy it alone. The claimants here would spoil that hope. They assert a right to share in his victory. McKenna is his alleged co-adventurer, who claims a one-third interest in the lease; Pan American Petroleum Corporation demands an assignment of the lease under an option contract. Wallis admits the agreements, but insists they relate to another venture which came to naught. The present lease, he maintains, is the fruit of a different venture in which the claimants have no part.

[1] The chronology of this controversy begins in early 1954. Wallis uncovered the acreage in question, apparently land of the United States on which no application for a mineral lease had been filed. He promptly communicated his "find" to McKenna, who was handling other matters for him in Washington before the Department of the Interior. In the meantime, another applicant, Morgan, submitted a lease offer covering at least portions of the lands involved. But Wallis nevertheless prepared his applications, five in number, and they were filed on June 2. In

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pealed to the Secretary of the Interior. By this time Wallis had an additional opponent, Strom, a later applicant who claimed a superior description of the lands. From the Secretary's rejection of their claims, Morgan and Strom prosecuted an appeal to the United States District Court for the District of Columbia. Their motion for a preliminary injunction was denied and, on February 20, 1961, summary judgment was entered in favor of Wallis. Morgan v. Udall, D.D.C., Civil Action No. 3248-58, 2/20/61. The court is advised that an appeal from that decision is presently pending before the Court of Appeals for the District of Columbia.

[2] Besides the possibility of reversal on the pending appeal in the proceedings entitled Morgan v. Udall, supra, Wallis must ultimately face the claim of the State of Louisiana in separate proceedings before this court. State of Louisiana v. Floyd A. Wallis, et al., E. D. La., Civil Action No. 9046. In that suit, Louisiana asserts title to the land involved here and disputes the right of the United States to grant a lease covering that acreage.

their collaboration on this venture, Wallis and McKenna worked out an agreement,[3] which was finally reduced to writing in a letter from Wallis dated December 27, 1954, approved by McKenna on January 3, 1955. Specifically referring to the applications already filed, the letter agreement recognizes in McKenna a one-third interest in those applications and in any lease to be issued thereunder.[4]

Three months later, after swift negotiations, Wallis, acting alone,[5] granted Pan American an option to acquire any lease issued to him pursuant to the still pending applications.

[2, 3] At this point, and for some months yet, everyone concerned[6] assumed the acreage in question was "ac-

[3] Agreement was actually reached in a telephone conversation on March 18, 1954. However, relating as it did to immovables, that oral understanding did not then bind the parties. See Note 13, infra. Even now, though admitted under oath, it probably has no force in view of the requirement of "actual delivery" in verbal contracts affecting immovables. LSA-C.C., Art. 2275. But, in any event, since the date is not crucial and the oral contract is admitted only to the extent incorporated in the December 27 letter, we may rely on the written document as evidencing the agreement between the parties.

[4] In view of the disposition here made, it is unnecessary to decide whether the agreement created a joint venture, or is more properly characterized as an agency coupled with an interest in view of the provision granting Wallis sole management of the undertaking. See Note 5, infra. In any case, as Wallis admits, the agreement was effective to transfer to McKenna an interest in the then pending applications and any lease issued thereunder.

[5] No question is raised as to Wallis' authority to contract alone with respect to such a lease in view of the stipulation in his agreement with McKenna that "all dealings in connection with these leases shall be at [Wallis'] sole discretion and direction." McKennta complains only of Wallis' alleged misrepresentations touching on the execution of the option contract and his failure to share the $8,300 option payment received from Pan American.

[6] While Pan American's attorney in the option transaction, Sandel, claims to have adverted to the possibility that the acreage in question might be classified as public domain land of the United States, the evidence is clear that he personally believed it was acquired land.

quired land" of the United States,[7] being apparently accretion to a tract purchased by the Department of the Army from a Louisiana patentee.[8] Wallis had sought a lease under the Mineral Leasing Act for Acquired Lands, 30 U.S.C.A. § 351 et seq., which applies only to such lands.[9] He had filed applications which would be ineffective if, as happened, the acreage were ultimately determined to be public land.[10] Neither McKenna nor Pan American demurred. On the contrary, both actively supported the acquired lands theory. It was only in late 1955 or early 1956[11]

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[7] "Acquired land," as the term implies, is land obtained by the United States through purchase or other transfer from a state or a private individual and normally dedicated to a specific use. Land owned by the United States by virtue of its sovereignty is called "public domain land."

[8] The acreage in question is contiguous to a tract patented to Jergens by the State of Louisiana in 1898 and 1903, and sold by him in the latter year to the United States. The assumption of the parties apparently was that the area covered by the applications, being river alluvion formed by accretion or dereliction after this transaction inured to the United States, as the then owner of the banks, see LSA-C.C. Arts. 509, 510, under the same title as it held the banks, i. e., as "acquired land." Ultimately, the Director of the Bureau of Land Management, whose conclusions were affirmed by the Secretary of the Interior and also, apparently, by the District Court for the District of Columbia, determined that title to the Jergens tract never passed to the State of Louisiana, but that it was a "mud lump" which, together with all accretions thereto, including the present acreage, always was, and remains, public domain land of the United States.

[9] The original Mineral Leasing Act of 1920, 30 U.S.C.A. § 181 et seq., with certain exceptions not here relevant, applied only to public domain lands. See Justheim v. McKay, D.D.C., 123 F. Supp. 560, aff'd, 97 U. S. App. D. C. 146, 229 F. 2d 29. Enacted to remedy this deficiency, the 1947 Act in terms applies only to "acquired lands" not subject to lease under the 1920 statute. 30 U.S.C.A. §§ 351, 352. See McKenna v. Seaton, 104 U.S. App. D. C. 50, 259 F. 2d 780, 781, n. 1.

[10] The parties all agree on this point. Seaton v. Texas Company, 103 U.S. App. D. C. 163, 256 F. 2d 718, must be restricted to its peculiar facts.

[11] A dispute rages between McKenna and Wallis as to whether the realization that the land might be characterized as public domain resulted from one or another of two conferences held at the Department of Interior, or originated with Edelstein, the new attorney retained by the parties. But it is unnecessary to

that Wallis began to doubt he had guessed right about the character of the land.[12] Then, on the advice of new counsel, he submitted another application for the same tract under the "public domain lands" Mineral Leasing Act, 30 U.S.C.A. § 181 et seq. No new written agreements were entered into, nor were the old instruments amended. The question presented is whether McKenna and Pan American nevertheless acquired rights in the lease ultimately issued to Wallis under this fresh public domain application.

[4-7] The issue is very narrow under the Louisiana rule that all "contracts applying to and affecting" "oil, gas, and other mineral leases" must be reduced to writing. LSA-C.C. Arts. 2275, 2440, 2462, via LSA-R.S. 9:1105.[13]

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resolve this conflict since the discovery, by mutual accord, occurred no sooner than November, 1955, nor later than February, 1956.

[12] At the very outset, Wallis had apparently considered the acreage involved public domain land. But he quickly abandoned that position and accepted the view that it was acquired land, without further question until the end of 1955.

[13] While the legislative declaration that rights in mineral leases are "real rights and incorporeal immovable[s]," LSA-R.S. 9:1105, has not always been given full effect, see, e.g., Reagan v. Murphy, 235 La. 529, 105 So. 2d 210; Tinsley v. Seismic Explorations, Inc., 239 La. 23, 117 So. 2d 897; Hodges v. Long-Bell Petroleum Company, 240 La. 198, 121 So. 2d 831 (on rehearing); Harwood Oil & Mining Company v. Black, 240 La. 641, 124 So. 2d 764, the Louisiana Supreme Court has been consistent in reading § 1105 as requiring that contracts affecting such rights comply with the statute of frauds. Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768; Davidson v. Midstates Oil Corporation, 211 La. 882, 31 So. 2d 7; Wier v. Glassell, 216 La. 828, 44 So. 2d 882; Acadian Production Corp. of Louisiana v. Tennant, 222 La. 653, 63 So. 2d 343. The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See Stack v. De Soto Properties, 221 La. 384, 59 So. 2d 428, 430-431; LSA-C.C. Art. 2992. So does it apply to Pan American's option contract, LSA-C.C. Art. 2462.

Having failed to obtain new written agreements,[14] each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954—January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by

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Since the requirement that such contracts be in writing may affect the very existence of a cause of action or, at least, significantly affect the result, the Rule of Decision Act, 28 U.S.C. § 1652, as interpreted in Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, compels adherence to the local law, in disregard of the more liberal policy of F. R. Civ. P. Rule 43(a), 28 U.S.C. Macias v. Klein, 3 Cir., 203 F. 2d 205; cf. Kossick v. United Fruit Co., 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56. See also, Zacharie v. Franklin, 37 U.S. (12 Peters) 151, 9 L. Ed. 1035; Grafton v. Cummings, 99 U.S. (9 Otto) 100, 25 L. Ed. 366; Moses v. Lawrence County Bank, 149 U.S. 298, 13 S. Ct. 900, 37 L. Ed. 743.

[14] Despite repeated contacts with him during three and a half years preceding issuance of the lease, Pan American claims not to have known about the new application filed by Wallis, and, accordingly, says it had no occasion to ask for revision of its option contract. But such knowledge is, of course, irrelevant. Pan American is not here penalized for negligence. Either the original agreement applies to the lease issued, in which case no amendment was necessary; or it does not, in which case Wallis might properly have refused to revise the contract.

McKenna, on the other hand, knowing of the new application, immediately sought from Wallis written confirmation of his interest in any lease that might issue thereunder. The very next day after it was filed he transmitted to Wallis for execution a power of attorney covering the public domain application which acknowledged his supposed interest. Wallis refused to sign the instrument and shortly "discharged" McKenna.

virtue of any subsequent estoppel.[15] Accordingly, we turn to those instruments.

[8] The letter which incorporates the agreement between Wallis and McKenna, after particularly listing and identifying certain numbered lease applications, being those filed by Wallis under the Mineral Leasing Act for Acquired Lands, confirms in McKenna "a ⅓ undivided interest *in the above captioned oil and gas lease applications* * * * [and] such lease or leases as may be issued * * * *under these captioned applications* * *" (emphasis added). Similarly, the agreement with Pan American recites the same five pending applications and grants the company "the right and option * * * to acquire any and all oil and gas leases which may be issued * * * *under and by virtue of the above referred to applications.*" (Emphasis added.) Much is made of a second paragraph of the option agreement where Wallis promises, in general terms, to "make diligent efforts" to obtain a lease over the lands covered by the applications. But that provision does not purport to enlarge the scope of the grant.[16] Thus, both instruments

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[15] See Scurto v. Le Blanc, 191 La. 136, 184 So. 567; Pan American Production Co. v. Robichaux, 200 La. 666, 8 So. 2d 635; Wier v. Glassell, supra; Blevins v. Manufacturers Record Publishing Co., 235 La. 708, 105 So. (2d) 392, 414 (on rehearing), and cases there cited. Of course, if Wallis did in fact breach his agreements, he may be answerable in damages or compelled to make restitution. LSA-C.C. Arts. 1926, 1928, 1930-1934. But neither dissolution of the contracts, nor damages, are prayed for here. This is a suit for specific performance only.

[16] Paragraph II of the option contract reads:

"Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands."

speak exclusively of an acquired lands lease. Was this an oversight?

[9-11] With scant excuse,[17] the court permitted parol evidence to show the true intent of the contracting parties on the date the agreements were executed. But, not surprisingly, the documents and testimony produced only confirmed the indication of the written instruments that on January 3 and March 3, 1955, no one contemplated issuance of a lease to Wallis except in pursuance of the then pending acquired lands applications. That was all they talked about. And, quite naturally, that is all they put

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Standing alone, this provision would convey nothing. It merely imposes an additional duty, supplementing the fundamental obligation recited in the first paragraph. Nor does it throw light on the subject matter of the contract. On the contrary, being a mere accessory stipulation, its apparently general terms must be considered qualified by paragraph I, which indicates precisely "the things concerning which * * * the parties intended to contract." LSA-C.C. Arts. 1959, 1961. See State ex rel. Ditch v. Morgan's Louisiana & T. R. & S.S. Co., 111 La. 120, 35 So. 482; Dufrene v. Bernstein, 195 La. 575, 197 So. 236.

As to Sandel's claim with respect to paragraph II, see Note 18, infra.

[17] The general rule, of course, is that, while extrinsic evidence is inadmissible when the words of the agreement are unambiguous, LSA-C.C. Arts. 1945(3), 1963, 2276, in case of doubt the court should consider what the parties said, or wrote, or did, in pursuance of their agreement. LSA-C.C. Arts. 1949, 1950, 1956. Here, the contracts may be thought unambiguous, but, in view of the liberal rule adopted by the Louisiana courts, see Plaquemines Oil & Development Co. v. State, 208 La. 425, 23 So. 2d 171, 174; Gulf Refining Co. v. Garrett, 209 La. 674, 25 So. 2d 329, 338-339 (on rehearing); Rosenthal v. Gauthier, 224 La. 341, 69 So. 2d 367, 369; Simmons v. Hanson, 228 La. 440, 82 So. 2d 757, 758-759, and, in the absence of a jury, it seemed "a reasonable, common sense exercise of judicial discretion * * * to give the benefit of the doubt to the proponent of the offered evidence, in order to avoid a remand and retrial and in the interest of determining truth through trial." Elkins v. Townsend, 5 Cir., 296 F. 2d 172, 177. See also, F.R. Civ. P. Rule 43(c).

into their agreements.[18] Doubtless, McKenna and Pan American were both anxious to share in *any lease* Wallis might obtain over these lands. At the time, however, they saw only one means of achieving that end. Had they anticipated the ultimate issuance of a public domain lease, perhaps they would have purchased an interest in that contingency too. But that is a futile speculation. Obviously they cannot be said to have intended to buy a share in a future they did not even advert to. The conclusion must be that the written agreements faithfully record what was in the minds of the parties. Accordingly, there is no pretext for a strained construction or for reformation of the instruments. These instruments, taken alone or illumined by parol evidence, limit the claims of McKenna[19] and Pan American to the acquired lands applications.

It may be true, as plaintiffs suggest, that the lease ultimately granted, pursuant to the public domain applica-

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[18] Indeed, Wallis' letter to McKenna, which embodies their agreement, traces almost literally the language of McKenna's prior letter requesting written confirmation of his interest.

Though Campbell, the Pan American agent who negotiated the option "deal" with Wallis, makes no such claim, Sandel, the attorney who drafted the contract, insists that paragraph II of the contract was inserted, inter alia, to cover the contingency that a public domain lease might be issued to Wallis, after the latter alerted him to that possibility by mentioning that Morgan had filed both types of application. But all the evidence, including Sandel's own correspondence, contradicts that assertion. Moreover, it is difficult to understand why the draftsman was not more explicit if apprized of the contingency and intending to provide for it. Under the circumstances, the allegation must be rejected. See LSA-C.C. Art. 1958.

[19] Insofar as McKenna performed services beyond the obligations of his contract which contributed to the eventual issuance of the public domain lease, he may be entitled to compensation on a quantum meruit basis, or under the theory of unjust enrichment. But that is no part of his prayer in the present proceeding.

tion, is, from the lessee's point of view,[20] no different than one issued under an acquired lands offer. But that decides nothing. For so might a lease acquired by Wallis from the state or by assignment from Morgan, had the latter prevailed, be in all respects identical to the one in suit. Yet, clearly, neither McKenna nor Pan American could properly assert any interest in a lease obtained in that way. The important fact here is that the lease in dispute resulted from a new filing, based on a new theory, which was governed by a different statute and processed under different regulations.[21] The public domain application cannot be viewed as a mere amendment of, or substitute for, the old offers. It stands on its own feet, holding its own priority. And the new filing in no way cancelled or superseded the earlier applications. In effect, Wallis had two irons in the same fire, in only one of which McKenna and Pan American held an interest.

[12] In short, in the administrative view, at least, the lease in question is wholly unconnected with the original acquired lands applications. Tempted as it might be to disregard technicalities, even a court of equity must

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[20] There are differences from the lessor's point of view. Compare, e. g., 30 U.S.C.A. § 191 with 30 U.S.C.A. § 355 with respect to the disposition of moneys received by the United States as lessor.

[21] As already noted, lease of public domain lands is governed by the Mineral Leasing Act of 1920, 30 U.S.C.A. § 181, et seq., while lease of acquired lands is governed by the Mineral Leasing Act for Acquired Lands of 1947. The latter statute adopts the rules and regulations for public lands leasing "to the extent that they are applicable," 30 U.S.C.A. § 359, but, as a matter of fact, the regulations promulgated by the Secretary of the Interior are very different. Compare, e. g., 43 C.F. R. § 192.42-192.42a with 43 C.F.R. § 200.5-200.8. The particularity with which the acquired lands applications are listed and described in the instruments in suit demonstrates that the parties themselves were aware of this difference and appreciated its importance.

recognize as a reality administrative rules and regulations which so vitally affect valuable rights.[22] Thus, here, the distinction made between acquired lands leases and public domain leases cannot be ignored, and the lease issued must be viewed as the fruit of a fresh undertaking, separate and apart from the venture in which the claimants had a part. It follows that, whatever remedies they may have in separate proceedings, if Wallis dealt unfairly with them,[23] neither McKenna nor Pan American acquired any interest in the lease in suit.[24]

Decree accordingly.

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[22] As Judge Hart observed during the hearing of Morgan v. Udall, supra: "These things get plumb technical." But, just as he did, so must this court give due weight to the administrative regulations, no matter how technical they may appear.

[23] See Notes 15 and 19, supra.

[24] Disposition on the grounds stated renders moot the other factual and legal issues raised. Accordingly, no finding is entered with respect to McKenna's alleged misrepresentation of his qualifications to practice before the Department of the Interior or his alleged failure to fulfill the obligations assumed under his contract with Wallis, and no conclusion is reached with respect to Pan American's apparent failure to exercise its option in writing. Nor is there any occasion to reconsider the preliminary rulings entered by order dated September 13, 1960, on Wallis' motion to dismiss.

COURT OF APPEALS OPINIONS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA,

Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION,

Appellees.

PAN AMERICAN PETROLEUM CORPORATION,

Appellant,

versus

FLOYD A. WALLIS,

Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(January 21, 1964.)

Before RIVES and WISDOM, Circuit Judges, and BOOTLE, District Judge.

RIVES, Circuit Judge: These actions, involving common questions of law and fact, were consolidated in the district court and decided pursuant to an opinion reported at 200 F. Supp. 468. They involve rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering 826.87 acres of exceedingly rich "mud lumps" at the mouth of the Mississippi River in Plaquemines Parish, Louisiana.

The lease was issued to Wallis on December 19, 1958, effective January 1, 1959. The lease was of public domain land, that is land in which title vested in the United States because of its sovereignty pursuant to the Mineral Leasing Act of 1920, now appearing as Title 30, U. S. C. A. § 181, et seq., as distinguished from acquired land, that is land which was once privately owned and then acquired by the United States, the leasing of which is pursuant to the Mineral Leasing Act for Acquired Lands of August 7, 1947, now appearing as Title 30, U. S. C. A. § 351, et seq.

The claims both of McKenna and of Pan American were based upon events occurring prior to the issuance of the lease to Wallis. McKenna claimed that Wallis and he were joint venturers in acquiring the lease, and that he was entitled to an undivided one-third interest in the lease. Pan American claimed that Wallis had entered into an agreement granting Pan American the option to acquire the lease thereafter issued to Wallis. The district court decided that neither McKenna nor Pan American acquired any interest in the lease upon what the court referred to as a very narrow issue, saying:

> "The issue is very narrow under the Louisiana rule that all 'contracts applying to and affecting' 'oil,

> gas, and other mineral leases' must be reduced to writing. LSA-C. C. Arts. 2275, 2440, 2462, via LSA-R.S. 9:1105. Having failed to obtain new written agreements, each of the plaintiffs is compelled to rely on a single instrument. McKenna's claim is imprisoned in the letter agreement of December 27, 1954-January 3, 1955; Pan American's claim is confined to the language of the March 3, 1955 option. Except as it throws light on their original intent, the conduct of the parties after those dates is irrelevant. Any new understandings reached in 1956, 1957, 1958 or 1959 are unenforceable in the absence of a writing. Nor does it matter whether Wallis obtained his lease by breaching his trust, as alleged. If the claimants acquired an interest in the lease, it is under the written instruments, not by virtue of any subsequent estoppel."

McKenna v. Wallis, E.D. La. 1961, 200 F. Supp. 468, 471, 472.

We think that the district court committed fundamental error in applying Louisiana statutes and law to determine rights in a lease on public domain land which were and are subject only to the sovereignty of the United States. The principle as to which law, state or federal, applies was stated long ago in *Wilcox v. McConnell*, 1839, 38 U.S. (13 Peters) 498, 516:

> "We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws,

> the title shall have passed, then that property, like all other property in the state, is subject to the state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

Subsequent decisions have made it clear that "title" as used in that principle includes not only the legal title, but also the equitable title, indeed, the entire bundle of rights going to make up ownership. Whether the lease from the United States to Wallis was in part for the benefit of McKenna or of Pan American or of both are questions to be determined by federal law.

Irvine v. Marshall, et al., 1858, 61 U.S. (20 How.) 558, requires the application of federal law until both legal and equitable titles have passed from the United States. The United States was not a party to that litigation, but the Court recognized in clear and unmistakable terms that the United States owed a duty, to be performed both through its General Land Office and through its federal courts, to see that the equitable title as well as the legal title to public lands was vested in the proper person who proved his right under the federal law. The opinion emphasized the doctrine of resulting trusts which may have application to the facts of this case:

> "With respect to resulting trusts, and the jurisdiction and duty of the courts of the United States to enforce them, the opinion of this court has been emphatically declared; and so declared in a case of peculiar force and appositeness, because it related to the acts of an agent in the entry and survey of lands, and is in its principal features essentially the same with the cause now under consideration.

We allude to the case of Massie v. Watts, reported in the 6th vol. of Cranch, p. 143. This was a suit in equity in the Circuit Court of the United States for the district of Kentucky, to compel the conveyance of land from an agent to his principal, upon the ground that the agent had withdrawn an entry on lands made in the name of his principal, had caused an entry and survey to be made in his own name, and had thereby obtained a legal title to this land. In decreeing the relief sought by the complainant, this court, expounding the law by the Chief Justice (pp. 169, 170), said: 'If Massie *(i.e.,* the agent) really believed that the entry of O'Neal (his principal), as made, could not be surveyed, it was his duty to amend it, or to place it elsewhere. But if in this he was mistaken, it would be dangerous in the extreme—it would be a cover for fraud which could seldom be removed, if a locator alleging difficulties respecting a location might withdraw it, and take the land for himself. But Massie, the agent of O'Neal, has entered the land for himself, and obtained a patent in his own name. According to *the clearest and best established principles of equity,* the agent who so acts becomes a *trustee* for his principal. He cannot hold the land under an entry for himself, otherwise *than as a trustee for his principal.*' This exposition of the equity powers of the courts of the United States as applicable to resulting trusts—a power inseparable from the cognizance over frauds, one great province of equity jurisprudence—is conclusive.

"With respect to the power of the Federal Government to assert, through the instrumentality of its

appropriate organs, and administration of its constitutional rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy." 61 U.S. at 565, 566.

The principles of law announced in repeated opinions of the Supreme Court seem to us clearly to lead to the conclusion that as to the original patent, lease or other grant from the United States, federal law controls in determining title in its broadest sense, including strictly legal title, trust rights and any and all equitable or beneficial interests. *Gibson v. Chouteau*, 1871, 80 U.S. (13 Wall.) 92, 101, 102; *Sparks v. Pierce*, 1885, 115 U.S. 408, 413; *Van Bracklin v. State of Tennessee*, 1886, 117 U.S. 151, 168; *Widdicombe v. Childers*, 1888, 124 U.S. 400, 405;[1] *Felix v. Patrick*, 1892, 145 U.S. 317, 328; *United States v. Colorado Anthracite Co.*, 1912, 225 U.S. 219, 223; *Buchser v. Buchser*, 1913, 231 U.S. 157, 161; *Ruddy v. Rossi*, 1918, 248 U.S. 104, 106, 107; see also other cases cited in 73 C. J. S. Public Lands, § 209, and 42 Am. Jur., Public Lands, § 37.

Indeed the same principle was recognized by the Supreme Court of Louisiana in the early case of *Kittridge v. Breaud*, La. 1843, 39 Am. Dec. 512, as follows:

[1] In that case, Widdicombe had got his patent but was held to be a purchaser in bad faith, the Court saying: "The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons." 124 U. S. at 405.

"And the principle is well recognized in our jurisprudence, as well as in that of the courts of the United States, that where an equitable right, which originated before the date of the patent, whether by the first entry or otherwise, is asserted, it may be examined into: *Brush v. Ware,* 15 Pet. 93; *Bouldin v. Massie,* 7 Wheat. 149."

The Mineral Leasing Act itself makes clear that, as a part of the public policy of the United States directed at opposing the monopoly of federally-owned mineral deposits, the Bureau of Land Management must examine into the qualifications of the real lessee and of any assignee of a mineral lease or of a part interest. See sections 181 and 184 of 30 U. S. C. A. Those provisions leave no room for operation of any State law.

The same result must be reached if we follow through on the logical views expressed by the Director of the Bureau of Land Management of the United States Department of Interior in his decision sustaining Wallis' application to lease as public domain land the acreage here involved:

"*What Law Then is to Control?*

"It is said in *United States v. Louisiana, supra* [1949, 339 U.S. 669], and *United States v. California, supra* [1946, 332 U.S. 19], that the resources in and under subaqueous soil of the sea are an incident to the paramount rights and power of the United States over the marginal sea; therefore, that power must be *paramount to any other power* in disposing of those resources. Since it was held

that the United States had the paramount power over and Louisiana did not have title to the marginal sea, then Louisiana must not have had a basis for legislative jurisdiction to dispose of the subaqueous soil or resources even though the United States may not have acted or entered the field. If Louisiana did not have the necessary contacts to establish a sufficient basis for legislative jurisdiction, how could any State real property law apply? The legislation and judicial decrees of a State can only apply to persons and things over which the State has jurisdiction. *Gibson v. Chouteau*, 13 Wall. 92, 99 (U.S. 1871).

"There is a strong presumption that any statute is to be construed *prima facie* territorial in effect. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1908). This lack of jurisdiction is based upon the proposition that a State does *not* have the power to deny the paramount authority of the United States over the marginal sea, *United States v. Louisiana, supra;* '(c)alifornia, like the thirteen original colonies, never acquired ownership in the marginal sea. * * *,' *Id.*, 704; this power, or rather lack of it, has no relation to the power of a State to use or regulate the marginal sea absent conflicting Federal policy, and the question is open so far as the power of a State to extend or establish its external territorial limits *vis a'vis* persons other than the United States or those acting on its behalf are concerned. *Id.*, 705. Nothing is apposite in *Manchester v. Massachusetts*, 139 U.S. 240 (1891) (inland waters); *The Abby Dodge*, 223 U.S. 166 (1912); or *Skiriotes v. Florida*, 313 U.S. 69, 75 (1940) (both

cases involve power of a State over her citizens), for there is quite obviously a great difference between the exercise of police power, within or without the territorial boundaries of a State and the proprietary rights in land within those same boundaries. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1914). The Department has taken the position that the boundary of the State of Louisiana prior to the date of the Submerged Lands Act of May 22, 1953 (67 Stat. 29; 43 U.S.C., secs. 1301-1315) was at the low water mark of the Gulf of Mexico and at that point marked by the separation of the inland waters from the open sea. *Solicitor's Opinion*, M-36239 (October 1, 1954). *United States v. Louisiana, supra*, implies this result. It is my opinion, based upon the above-cited authorities and analysis, that State real property law never applied to any of the subaqueous soil seaward of the inland waters within the former boundary of the State of Louisiana.

"Is State law controlling or applicable in grants and title questions involving public lands of the United States? It is a principle of law that a State cannot by legislative fiat decree a forfeiture of the public lands of the United States and proclaim title in herself. *United States v. Oregon*, 295 U.S. 1, 29 (1934). This is based upon the rule that Federal questions cannot be ultimately decided by State tribunals. *Brewer-Elliott Oil & Gas Co., et al. v. United States, et al.*, 260 U.S. 77, 87 (1922). Thus, the courts of the United States will construe the grants from the United States without reference to the rules of construction adopted by the States for

their own grants. *Packer v. Bird*, 137 U.S. 661 (1891); *Shively v. Bowlby*, 152 U.S. 1, 44 (1893) *United States v. Utah*, 283 U.S. 64, 75 (1930), states that '(s)tate laws cannot affect titles vested in the United States.' For example, the question of navigability is a Federal question, *United States v. Utah, supra*, 75; consequently, when the United States is disposing of a portion of its public domain, State law can no more affect the original paramount title of the United States which involves construction of one of its grants than could a State court or legislature pronounce a stream navigable with binding effect which the courts of the United States found to be non-navigable. *United States v. Oregon, supra*, 29; *Oklahoma v. Texas*, 258 U.S. 574, 583, 591 (1922). While the 'public land' States possess certain jurisdictional police powers over public lands of the United States situated within the State's boundaries, *McKelvey v. United States*, 260 U.S. 253, 258 (1922), those States have no basis for jurisdiction to legislate or otherwise affect title paramount to the public lands of the United States, and State real property law could in nowise divest or delimit the rights and expectations of the United States in its public lands as known at common law which is the general law followed by the courts of the United States."

We would intimate no opinion as to who may ultimately be entitled to prevail in this litigation. In our opinion, the judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and

complete findings of fact and conclusions of law on all issues under the applicable principles of federal law.

VACATED AND REMANDED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent:

In this case there is much to be said for drawing on the "federal common law" to determine the rights of the parties. After all, the parties claim under a lease from the United States. And, in the matter of equitable remedies, the law of the forum here differs importantly from the law of the rest of the States: the civil law does not recognize resulting trusts or constructive trusts, not at least as these great tools of justice are effectively used in the common law to rectify the effects of bad faith.

But I can find no escape from the consequences of the fact that title to the lease in question passed from the United States to Wallis.

With due deference, it seems to me that *Irvine v. Marshall* does not compel an application of federal common law rather than the law of the forum. In that case no patent had yet issued to either the plaintiff or the defendant, and it was held that a state or territorial law could not be invoked to force the issuance of a certificate of title to one or the other of two competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States:*

> "We hold the true principle to be this: that whenever the question in any court, State or Federal,

is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Here, the United States transferred all of its lease interest to Wallis. On December 19, 1958, the Department of the Interior issued a public domain lands lease to Wallis over a prior applicant, Morgan, whose bids did not contain a sufficient description of the land. After appeals to the district court and Court of Appeals for the District of Columbia, Morgan's contentions were rejected and Wallis's right to the government lease became final. *McKenna v. Seaton*, D.C. Ct. App. 1958, 259 F. 2d 780, *cert. den'd* 358 U.S. 835, 79 S. Ct. 57, 3 L. Ed. 2d 71; *Morgan v. Udall*, D.C. Ct. App. 1962, 306 F. 2d 801, *cert. den'd* 371 U.S. 941, 83 S. Ct. 320, 9 L. Ed. 2d 275.

The case before the Court concerns a mineral lease and not a patent, but *Pan American Corporation v. Pierson*, 10 Cir. 1960, 284 F. (2d) 649, *cert. den'd* 366 U.S. 936, makes it clear that there is no distinction between a patentee and a lessee of a mineral lease, as far as passage of title to the mineral is concerned:

"We deem it unnecessary to delve into the legal complexities as to whether an oil and gas lease grants a profit a prendre or creates an estate in land. Under the first theory the lessee gains title to

the oil and gas after its severance and under the second the lessee has an ownership of the hydrocarbons in place. Under each theory the government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises."

Some of the decisions relied upon by the majority may be distinguished on the facts from this case. Thus *Widdicombe v. Childers*, 1888, 124 U.S. 400 and similar cases are distinguishable in that the claimant "had acquired a prior right from the United States in force when his purchase was made under which his patent issued". There is no question here, as there was in *United States v. Louisiana*, 1949, 339 U.S. 669 and *United States v. California*, 1946, 332 U.S. 19, of the paramount power of the United States over the marginal sea. The issue is not one involving the State's assertion of jurisdiction. There is no interference here with any overriding national interest. As in *Bank of America National Trust & Savings Association v. Parnell*, 1956, 352 U.S. 29, 77 S. Ct. 119, 1 L. Ed. (2d) 93, this litigation between private parties does not intrude upon national policy or the rights of the United States. When leasing its lands to individuals, unless there are special circumstances, the government acts in a proprietary capacity in the same way as does the private land owner. *Campfield v. United States*, 1897, 167 U.S. 518, 524.

If the law of the forum controls, as I think it does, although "the jurisprudence of this State has fluctuated in construing a mineral lease as being in essence a real right or a personal right, it has been consistent to the

effect that the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence." *Hayes v. Muller*, La. App. 1962, 146 So. 2d 176, 179; certified to Supreme Court and affirmed. Louisiana law, therefore, does not allow McKenna to prove his claim to a one-third interest in the title to the lease or allow Pan American to go beyond the terms of the option agreement. Whatever rights McKenna may have to an accounting for the profits resulting from a joint venture (see *Hayes v. Muller)*, or otherwise, he cannot prove title to an interest in the lease itself by parol evidence. And whatever rights Pan American may have for damages for Wallis's breach of covenant "to make diligent efforts" to accomplish the purpose of the option, the parol evidence rule bars a court enforced conveyance of a lease not covered by the option.

I would affirm the judgment of the district court, without prejudice to the plaintiffs' rights, if any, to bring new and different actions, not based on McKenna's claim to a one-third interest in the title to the lease and not based on Pan American's claim to specific performance of the option.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962

No. 19631

D. C. Docket No. 8904

PATRICK A. McKENNA,

Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION,

Appellees.

PAN AMERICAN PETROLEUM CORPORATION,

Appellant,

versus

FLOYD A. WALLIS,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RIVES and WISDOM, Circuit Judges, and BOOTLE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that said cause be, and it is hereby remanded to the said District Court for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Floyd A. Wallis, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"WISDOM, Circuit Judge, dissenting"

January 21, 1964

Issued as Mandate:

COURT OF APPEALS OPINIONS AND ORDER DENYING REHEARING

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19631

PATRICK A. McKENNA,

Appellant,

versus

FLOYD A. WALLIS and PAN AMERICAN PETROLEUM CORPORATION,

Appellees.

PAN AMERICAN PETROLEUM CORPORATION,

Appellant,

versus

FLOYD A. WALLIS,

Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(April 20, 1965.)

ON PETITIONS FOR REHEARING

Before RIVES and WISDOM, Circuit Judges, and BOOTLE, District Judge.

RIVES, Circuit Judge: All parties have petitioned for rehearing and the Court has received additional briefs. In our original opinion, this Court held, Judge Wisdom dissenting, that federal law should be applied to determine rights asserted separately by Patrick A. McKenna and Pan American Petroleum Corporation in an oil and gas lease from the United States to Floyd A. Wallis covering public domain land. The district court had decided that under Louisiana law neither McKenna nor Pan American acquired any interest in the lease. We vacated the judgment and remanded the cause "for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law." Pan American has petitioned for a rehearing limited to the interpretation of its claimed option agreement with Wallis, and it requests this Court to find as a fact that Wallis breached his fiduciary relationship. McKenna limits his petition for a rehearing to a request for additional findings of a joint venture between Wallis and McKenna, that Wallis breached his fiduciary obligations to McKenna and that Wallis failed to prove fraud on the part of McKenna. Wallis challenges our holding that federal law governs the claims of McKenna and Pan American and our reliance upon *Irvine v. Marshall*, 61 U.S. (20 How.) 558 (1858).

As stated in our original opinion, the United States, acting through the Secretary of the Interior, issued an oil and gas lease of public domain land to Floyd A. Wallis pursuant to the Mineral Leasing Act of 1920, 30 U. S. C. A. §

181, et seq. We have concluded that our decision should be more closely tied to that Act.

It should be noted that the actions before the district court, and before this Court on appeal, do not seek to overturn the decision of the Secretary awarding the lease to Wallis. McKenna and Pan American were not applicants who competed with Wallis before the Secretary. Indeed, it is evident that McKenna and Pan American supported Wallis's claim to the Secretary that he was the first qualified applicant for the acreage in question and entitled to a lease. If these actions were those of "competing claimants," the Secretary's decision would be subject to judicial review only if it were shown that he had acted arbitrarily or unreasonably or that his interpretation of what constitutes "public lands" was erroneous as a matter of law. *E.g.*, *Morgan v. Udall*, D.C. Cir. 1962, 306 F. (2d) 799.

We again deal with which law applies, and particularly with the contention that the Rules of Decision Act, 28 U.S.C. § 1652 (1958), requires that state law be applied to determine the claims of McKenna and Pan American to the oil and gas lease. It appears that the district court felt that the Rules of Decision Act compelled adherence to the local law. See 200 F. Supp. at 471-72, n. 13. And the Tenth Circuit has followed that view in a case involving a claim of "joint venture" highly similar to McKenna's claim here. *Blackner v. McDermott*, 10 Cir. 1949, 176 F. (2d) 498. That court held, *inter alia*, that

> ". . . jurisdiction of the court resting upon diversity of Citizenship, and the action not being one under federal law, the relationship of the parties each toward the other in respect of the leasehold estate

> must be determined by the law of Wyoming. Erie Railroad Co. v. Tompkins, 304 U.S. 64 . . . Ruhlin v. New York Life Insurance Co., 304 U.S. 202 . . ."

176 F. 2d at 500. Although the actions in the instant case were predicated upon diversity of citizenship, and although the action is not one under federal law in the sense that federal law did not create the right of action, it does not necessarily follow that the district court was required to apply state law. The Rules of Decision Act[1] says nothing about the basis of jurisdiction. While it is true in the bulk of diversity cases the substantive issues are non federal and hence state substantive law is determinative, this is not always true.[2] The law applied should be keyed to the nature of the issue before the court; if nonfederal, state substantive law should be applied; if a federal matter is before the court, federal law should be applied.[3] *Francis v. Southern Pacific Co.*, 1948, 333 U.S. 445, involved an action for the wrongful death of a railroad employee who was killed while riding on a free pass. Jurisdiction was predicated upon diversity of citizenship and the right of action was created by state law. Federal statutes provided extensive regulation of the giving of free passes by railroad; however, these statutes were silent as to the tort duties of a railroad to the recipient of a free pass. The Supreme Court held that federal law was to be applied and that state's tort law did not control. The "*Erie* doctrine"

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[1] The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 28 U. S. C. A. § 1652.

[2] See 1A Moore, Federal Practice Par. 0.305[3], at 3045 (2d ed. 1961).

[3] See 1A Moore, op cit., *supra*, Par. 0.305[3], at 3053.

does not annul the federal courts' responsibility to develop federal common law in aid of the uniform implementation and protection of federal interests.[4]

In summary, when jurisdiction of the federal courts is based on diversity of citizenship, all nonfederal matters will be decided by applying the law of the state in which the court is sitting while federal issues in such cases will be decided by reference to federal law. Where federal matters are involved, the specific language of valid federal statutes will control when applicable; where federal statutes do not clearly articulate the law to be applied, federal courts must fill the interstices; federal courts can do this by reference to federal or state law and the choice here depends on a number of different factors.[5] The first question presented in the instant case is whether or not "federal matters" are involved.[6]

Prior to 1920, lands of the United States containing deposits of coal, phosphate, sodium, oil, oil shale, and gas were open to location and acquisition of title. Congress, by its mining laws, provided that claims might be "located" on these lands on the performance of certain conditions. Congress also made provision for issuing patents for claims located under the mining laws. See *Wilbur v. United States, ex rel. Krushnic*, 1930, 280 U.S. 306, 314. When the location of a mining claim was perfected under the law, it had the effect of a grant by the United States of the right of present and exclusive possession. The claim was property

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[4] 50 *Va. L. Rev.* 1236 (1964).

[5] 1A Moore, op cit., *supra* Par. 0.328, at 3901.

As one student commentator has put it: "First, the federal court must determine whether a sufficient federal interest is present to preempt the authority of state law." 50 *Va. L. Rev.* 1236, 2141 (1964).

in the fullest sense of that term and might be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner was taxable by the state and was "real property" subject to the lien of a judgment recovered against the owner in a state or territorial court. See *id.* at 316. However, the Mineral Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, potassium, oil, oil shale, or gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. *Id.* at 314 (dictum). A mineral lease does not give the lessee anything approaching the full ownership of a fee patentee, nor does it convey an unencumbered estate in the minerals. *Boesche v. Udall*, 1962, 373 U.S. 472, 478 (dictum) (Secretary has authority to cancel lease granted in violation of Act and regulations promulgated thereunder). In the latter case, the Supreme Court stated that,

> "Unlike a land patent, which divests the Government of title, Congress under the Mineral Leasing Act has not only reserved to the United States the fee interest in the leased land, but has also subjected the lease to exacting restrictions and continuing supervision by the Secretary."

Id. at 477-78. Thus the Secretary is given power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased. 30 U. S. C. A. § 189. The Secretary may direct complete suspension of operations on such lands, 30 U. S. C. A. § 209, or require the lessee to operate under a cooperative or unit plan, 30 U.S.C.A. § 226 (j). See *Boesche v. Udall*, 1962, 373 U.S. 472, 478. And as we noted in our original opinion, the

public policy of the United States directed at opposing the monopoly of federally-owned mineral deposits requires that the Secretary examine into the qualifications of the real lessee and any assignee of a mineral lease or of a part interest. See 30 U.S.C.A.§§ 181, 184. This includes oil and gas leases "acquired directly from the Secretary under this Act or otherwise . . . (including options for such leases or interests therein)." 30 U.S.C.A. § 184 (d) (1). Such "options" are limited as to acreage, 30 U.S.C.A. § 184 (d) (1), and time, 30 U.S.C.A. § 184 (d) (2). "No option . . . shall be enforcible if entered into for a period of more than three years . . . without the prior approval of the Secretary." 30 U.S.C.A. § 184 (d) (2). By implication, "options" for less than three years may be freely entered into without prior approval. However, "No option . . . shall be enforcible until notice thereof has been filed with the Secretary . . ." 30 U.S.C.A. § 184 (d) (2). Furthermore, assignments or subleases of all or part of the acreage included in an oil or gas lease must be approved by the Secretary. See *Boesche v. Udall*, 1962, 373 U.S. 472, 478; 30 U.S.C.A. § 187a. The Secretary is required to disapprove the "assignment" or "sublease" only for lack of qualification under the Act or for lack of sufficient bond. See 30 U.S.C.A. § 187a. Nowhere in the Mineral Leasing Act of 1920 are the terms "assignment" and "option" defined.

The posture of the instant case is interstitial. The Secretary has granted a lease to Wallis. We deal with claims that are, in essence, an alleged "option" and an alleged "assignment," but which, ultimately, must be approved by or registered with the Secretary. We think, therefore, that there is a sufficient federal interest for the sub-

stantive independence of the federal court in determining the claims of McKenna and Pan American.

It might be said that the absence of a congressional definition of "option" and "assignment"—whether they may be oral or arise by operation of trust—implies that we should look to the law of the state. But we are impressed by the fact that the Mineral Leasing Act of 1920 represents a comprehensive scheme of federal regulation. Besides the public policy directed at opposing the monopoly of federally-owned mineral deposits, Congress has expressed recent concern over "a potentially dangerous slackening in exploration for development of domestic reserves of oil and gas so necessary for our security in war and peace." It removed "certain legislative obstacles to exploration for development of the mineral resources of the public lands and [to] spur greater activity for increasing our domestic reserves." S. Rep. No. 1549, 86th Cong. 2d Sess. (1960), reprinted in 1960 U.S. Code Cong. & Ad. News 3313, 3314-15. As Judge Wisdom noted in his dissent, the civil law does not recognize resulting trusts or constructive trusts and therefore the law of Louisiana differs importantly from the laws of the common-law states. While it might be said that the claim of McKenna for the assignment of part interest in the acreage covered by the lease and the claim of Pan American of the option agreement constitute transactions essentially of local concern and that the resulting litigation is "purely between private parties," we think that the interest of the United States is directly affected. Compare *Bank of America Nat'l Trust & Sav. Ass'n v. Parnell*, 1956, 352 U.S. 29, 33-34. It is clear that the Mineral Leasing Act recognizes the devices of "assignments" and "options" as concomitants to the public policy against monopoly of federally-owned mineral deposits and, on the

other hand, the public policy towards development of our mineral resources and increasing our domestic reserves. We do not think the use of these devices as a part of the scheme of carrying forth this public policy should be limited by interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states. In a word, we think this is an area for uniformity.[7]

We hold to what we said in our original opinion in that "we would intimate no opinion as to who may ultimately be entitled to prevail in this litigation . . . [T]he judgment should be vacated and the cause remanded for re-trial upon the evidence already taken and any additional relevant evidence, and for full and complete findings of fact and conclusions of law on all issues under the applicable principles of federal law."

REHEARING DENIED.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent.

I do not say that the Court's decision is likely to start dangerous temblors in American federalism. It has always been in the cards that federal common law would expand as the activities of the national government expanded.[1] For many years, before *Erie*, the federal "judge followed his own nose"; he "sat down and looked up what relevant federal law there might be in the cases and other-

[7] Hodgson v. Federal Oil & Development Co., 1927, 274 U. S. 15, does not lead to a different result. We read *Hodgson* as fashioning a federal law of fiduciary relationship by drawing on the law of several states. See *id.* at 19-20.

[1] See Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797 (1957).

wise decided what the law ought to be . . . though in some few instances the judge might consider relevant state decisions".[2] Moreover, I agree with Judge Henry Friendly's summary of the development, since *Erie*, of the "new" federal common law: "We may not have achieved the best of all possible worlds with respect to the relationship between state and federal law. But the combination of *Erie* with *Clearfield* and *Lincoln Mills* has brought us to a far, far better one than we have ever known before."[3] I do say that in this case the Court's resort to federal common law is so inappropriate as to amount to a deep and uncalled-for cut against the grain of American federalism.

I.

We sit as an Erie court, bound by the law of Louisiana; bound too by the Rules of Decision Act. Yet in this squabble between private persons the Court holds that the nature of the ownership of the lease, that is, the nature of the lessee's interest in the minerals as against third party claimants, is a matter to be determined by judge-made federal common law. The Court brushes aside the state's longstanding public policies against title by parol[4] and

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[2] Morgan, The Future of a Federal Common Law, 17 Ala. L. Rev. 10, 12 (1964).

[3] Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 422 (1964).

[4] In the opinion below Judge Wright correctly noted: "While the legislative declaration that rights in mineral leases are 'real rights and incorporeal immovable[s].' LSA-R.S. 9:1105. has not always been given full effect. (citing cases) . . . [T]he Louisiana Supreme Court has been consistent in reading § 1105 as requiring that contracts affecting such rights comply with the statute of frauds. Arkansas Louisiana Gas Co. v. R. O. Roy & Co., 196 La. 121, 198 So. 768; Davidson v. Midstates Oil Corporation, 211 La. 882, 31 So. 2d 7; Wier v. Glassell, 216 La. 828, 44 So. 2d 882; Acadian Production Corp.

against resulting and constructive trusts, devices alien to the civil law.[5] The "jurisprudence of this State . . . has

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of Louisiana v. Tennant, 222 La. 653, 63 So. 2d 343. . . . The rule applies to McKenna's agreement, whether it is considered as creating a joint venture or an agency relationship. See Stack v. De Soto Properties, 221 La. 384, 59 So. 2d 428, 430-431; LSA-C.C. Art. 2992. So does it apply to Pan American's option contract. LSA-C.C. Art. 2462." McKenna v. Wallis, E. D. La. 1961, 200 F. Supp. 468, n. 13 at 471. In Hayes v. Muller, La. App. 1962, 146 So. 2d 176, 179, the court held that an alleged joint venture effecting the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence. The Louisiana Supreme Court affirmed, 245 La. 356, 158 So. 2d 191, 198, commenting, on rehearing, that it had been "zealous . . . to guard against any deviation from the rule" that the "plaintiff cannot show an oral agreement to purchase property for him, and enforce the contract when it has been fraudulently violated (by acquisition in defendant's name), despite the argument made therein that the evidence did not constitute an attack on the title of the defendant but was merely an attempt to profit from and through such title."

[5] "Article 21 of the Louisiana Civil Code of 1870 authorizes the courts to apply equitable principles in their decisions. Porter v. Conway, 181 La. 487, 159 So. 725 (1934); see Willey v. St. Charles Hotel, 52 La. Ann. 1581, 1584, 28 So. 182, 186 (1899); see Franklin, Equity in Louisiana, 9 Tulane L. Rev. 485 (1935). However, it is frequently stated that from a theoretical viewpoint there can be no constructive trust in a civil law jurisdiction. See Patton, Future of Trust Legislation in Latin America, 20 Tulane L. Rev. 542, 548 (1946); see Wisdom, The Louisiana Trust Estates Act, 13 Tulane L. Rev. 70, 83 (1938)." Note 26 Tul. L. Rev. 262 (1952). See also Note, 25 La. L. Rev. 276, 280 (1964).

Since all transfers of immovable property must be in writing and, under LSA-C.C. Arts, 2275, 2276, 2440, parol evidence is not admissible to vary the terms of a written conveyance or to prove an oral agreement of sale, a defrauded principal or joint venturer cannot through parol evidence prove title to immovables purchased by an agent or joint venturer under an oral mandate. Scrto v. LeBlanc, 191 La. 137, 184 So. 567 (1938); Ceromi v. Harris, 187 La. 701, 175 So. 462 (1930); see Note, 21 Tulane L. Rev. 286 (1946). However, parol evidence may be used to prove fraud or error in an action to rescind written sales of real estate. Baker v. Baker, 219 La. 1041, 26 So. 2d 132 (1946); LeBleu v. Savoie, 109 La. 680, 33 So. 729 (1903); cf. Reid v. Phillips, 177 La. 497, 148 So. 690 (1933).

There are, however, a number of loose references in Louisiana decisions to "constructive trusts". McClendon v. Bradford, 42

been consistent to the effect that the transfer of an interest in a mineral lease cannot be made the subject of a verbal agreement and cannot be proved by parol evidence". *Hayes v. Muller*, La. App. 1962, 146 So. 2d 176, 179. On remand, the law the district judge must conjure up is as uncertain and insubstantial as the "brooding omnipresence in the sky", of which Justice Holmes spoke, because this evanes-

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La. Ann. 160, 7 So. 78 (1890); Gervais v. Gervais, 9 Orl. App. 69 (1911); Gaines v. Chew, 2 How. 619, 650 (U. S. 1844); Berthelot v. Isaacson, 5 Cir. 1922, 278 Fed. 921, 923. A result similar to the common law constructive trust has been attained in Louisiana decisions holding that title to *movable* property which is acquired by an agent through a breach of his fiduciary duty inures to the benefit of the principal. Sentell v. Richardson, 211 La. 288, 29 So. 2d 852 (1947); noted in 22 Tulane L. Rev. 196, and 8 La. L. Rev. 223 (1948) (purchase of hospital stock). Or when an agent acquires his principal's property by fraud or error. Assunto v. Coleman, 158 La. 537, 104 So. 318 (1925) (agent purchased principal's property at judicial sale).

Mansfield Hardwood Lumber Co. v. Johnson, 5 Cir. 1959, 268 F.2d 317, 319, 324, is a good example of federal court handling of Louisiana decisions in this area of the law. There this Court agreed "that the Louisiana Civil Law prohibits the imposition of a constructive trust or equitable lien on property". The Court recognized however that under LSA-C.C. Art. 1847 "a breach of the fiduciary relationship is called fraud [not constructive fraud] and the remedy is, of course, a rescission of the contract or damages. By bringing such relationship under the broad heading of fraud, the Louisiana courts have, in effect, reached the same results as would be reached under the common-law-results which seem to common-law lawyers hard to obtain under a literal interpretation of the Civil Code." Accordingly, in *Mansfield* the district court rescinded the sale of the plaintiff's stock to the defendant, recognized the plaintiffs as the owners of the stock, and ordered the defendant to render an accounting to the plaintiffs.

All of this adds up to the fact that by different theories the civil law reaches many of the results the common law reaches. There is no exact civilian equivalent to the Angola-American resulting trust or constructive trust. Here, the claimants may suffer from the difference between the two legal systems. But the difference in remedies generally is not so great as to justify the majority's far-out idea that Louisiana's lack of resulting and constructive trusts, as the Lord Chancellor knows them, substantially interferes with the national policy on mineral reserves.

cent law is *not* the articulate voice of a sovereign that can be identified.[6]

The holding of the Court carries alarming implications. If federal common law controls and the claimants hold an equitable title by virtue of a constructive trust, what is Mrs. Wallis's interest? Assuming that Wallis has a part interest as lessee, does his wife have half of his interest as her share in the community? Or is she a common law partner with him? Or does she have no interest in the lease? Are Wallis's children deprived of their legitime, their forced portion of their father's estate, as to their father's interest in the lease? I hope my fears are all bloodless ghosts. But if a federal court, in the name of interstitial law-making, may concoct a Law of Property, Law of Contracts, Law of Restitution and, perhaps, a Law of Descent and Distribution for Mississippi Mud-Lumps, I forsee the fashioning of some fancy legal systems for a great many federal enclaves within the borders of the states.[7]

II.

"There is", of course, "no federal general common law".[8] However, the term "federal common law", like Jus-

[6] "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." Southern Pacific Co. v. Jensen, , 244 U. S. 205, 222, 37 S. Ct. 524, 61 L. Ed. 1086, cf. Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L. J. 205, 274 (1946).

[7] "Establishing a body of substantive law for federal courts in matters not otherwise of federal concern is not a legitimate end within the scope of the Constitution; thus to frustrate the ability of the states to make their laws fully effective in areas generally reserved to them would be inconsistent with the constitutional plan." Friendly, supra, n. 3 at 397.

[8] Erie R. Co. v. Tompkins, 1938, 304 U. S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188.

tice Rutledge's substitute term, "law of independent judicial decision",[9] is an acceptable euphemism for federal judicial legislation. No one can quarrel with such lawmaking when congressional intent and national interest speak in the loud, clear voice of the sovereign. But the fact that there are interstices in a federal statute is not enough in itself to justify a court's applying federal common law. There are interstices in every statute.

Before a court plugs a statutory gap with federal law that is inconsistent with local law and that here is also contrary to established state policies, consideration for the position of the states in the federal system suggests that the Court find congressional intent that federal common law should prevail over state law.[10] "The political logic of federalism supports placing the burden of persuasion on those urging national action."[11] When congressional intent is unclear or when a specific congressional intent never existed, a reasonable criterion is that judge-made common law should not prevail over local law unless that result is manisfestly in the national interest. Uniformity for uniformity's sake does not meet this criterion; under *Erie* and the Rules of Decision Act, diverse local law controls the hum-drum disputes of private litigation that do

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[9] United States v. Standard Oil Co., 1947, 332 U. S. 301, 308, 67 S. Ct. 1064, 91 L. Ed. 2067.

[10] "The issue that must be determined in each instance is what heed Congress intended to have paid to state law in an area where no heed need constitutionally be paid—more realistically, in Gray's famous phrase, 'to guess what it would have intended on a point not present to its mind, if the point had been present.' We cannot expect that we shall always agree with the answer to such a question; we do have a right to expect that the question shall always be put." Friendly, n. 3, at 410.

[11] Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 545 (1954).

not raise a federal question and do not conflict with the interests of United States. In this case, I find no congressional intent and no compelling national interest sufficient to justify an independent federal rule displacing long accepted state law.

This is a dog-eat-dog, no-holds-barred fight between private persons, each crying foul, over the nature of the ownership of a lease. Resolution of the controversy depends upon legally acceptable proof of the relationship of Wallis to McKenna and Pan-American. It is true that the acts generating the litigation took place before execution of the lease. The point in time when these acts occurred, however, is not important to the United States as lessor, as it was in *Irvine v. Marshall*, 1858, 20 How. 558, 15 L. Ed. 994, since the dispute arose *after title to the mineral leasehold had passed from the United States to Wallis.*[12] Besides,

[12] In the instant case the entire title, legal and equitable, to the mineral leasehold passed at the time the lease was executed. In Irvine v. Marshall, on which the Court relied so strongly in the original opinion, the patent had not been issued to either of the competing parties. The Supreme Court recognized, however, that an entirely different rule would apply *once legal title had in fact passed from the United States*:

"We hold the true principle to be this: that whenever the question in any court, State or Federal, is whether a title to land which was once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States."

Pan American Petroleum Corporation v. Pierson, 10 Cir. 1960, 284 F.2d 649, cert. denied, 366 U. S. 936 supports Wallis's position. The Court held that the Secretary has no "authority to cancel an oil and gas lease for fraud of a lessee precedent to lease issuance". The Court said: "[T]he government, by the issuance of the lease, has performed the last act required of it to vest in the lessee the right to explore for, produce, market and sell the oil and gas underlying the leased premises."

McKenna and Pan-American do not question the validity or effectiveness of the transfer of the mineral leasehold from the United States to Wallis. On the contrary, it is essential to their position that they accept the validity of Wallis's lease: McKenna claims a one-third interest in the lease as a joint venturer; Pan-American demands an assignment of the lease under an option contract.

Whether Wallis holds the lease for himself or for others and whatever the interests of McKenna and Pan-American may be as against Wallis, the United States is protected by the terms of the lease and by statutory requirements that the Secretary of Interior investigate and approve Wallis and any assignee or sublessee. The United States owns the fee and exercises tight control over the lease through the Secretary's power to prescribe rules and regulations governing in minute detail all facets of the working of the land leased.

The United States has of course a proper interest in knowing the nature of the lessee's ownership. In the first place, the policies of the United States in favor of conservation of national resources and prevention of monopolies require the Secretary to know the true owners of the lease. The Act provides, therefore, for full disclosure of the lessee's interest in order to prevent lease-grabbing through

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284 F.2d at 654. The effect of this decision is uncertain, however, in view of Boesche v. Udall, 1963, U.S. , 83 S. Ct. , L.Ed.2d , holding that the Secretary has the administrative power, beyond § 31 of the Act, to cancel a lease because of an administrative error; § 31, allowing cancellation for the lessee's non-compliance with any of the provisions of the lease, applies only to situations in which a valid lease has been issued. The Court in *Boesche* was aware of *Pan American*, but did not discuss the case and spoke only in terms of administrative error. See Miller, The Historical Development of the Oil and Gas Laws of the United States, 51 Col. L. Rev. 506, 530 (1963).

the use of strawmen. Second, for obvious reasons, it is administratively convenient for the Secretary to deal with the record owner as the true owner. In general, these policies and interests will necessarily be affected adversely by the common law's recognition of unwritten, undisclosed trusts arising from the breach of a fiduciary relationship unknown to the Secretary. On the other hand, the civilian antipathy to oral, hidden trusts and equitable liens works hand in glove with the policies and interests of the United States. Certainly in this case, Judge Wright's adjudication that McKenna and Pan-American have no provable claim to the lease represents the optimum Congress and the Secretary could expect in administrative convenience and in the disclosure of outside interests.

Beyond all of this, a serious question exists as to whether the doctrine of separation of powers permits the judiciary, in effect, to force lessees upon the executive. And there is also the question whether the Act allows a court to select as assignees persons whom the Secretary has not investigated and formally approved. The policy objectives of the statute and its protective provisions may be easily circumvented, if courts have the power to reverse the Secretary's choice of lessee by recognizing third parties as the legal lessees by virtue of an unwritten option, assignment, or joint venture.

III.

In concluding that the issue for decision is a federal matter the Court, if I may say so, relied on this syllogism: (1) the federal Mineral Leasing Act permits options and assignments of leases approved by the Secretary; (2) here, in essence, the claims are an alleged option and an alleged

assignment; (3) therefore the claims are a federal matter. This reasoning does not stand up.

The Court's conclusion is a glaring non sequitur, unless the terms "option" and "assignment" are taken to include contested, amorphous claims such as McKenna and Pan-American present. But this is an impossible construction of the Act. Congress could have intended only that the Secretary approve uncontested options and assignments or, possibly, such agreements validated by adjudication. If a court has decreed the validity of a formal lessee's total ownership of a lease against third persons, or, in another case, if a court should validate all or part of the transfer of a lessee's interest, it is difficult for me to understand what difference it makes to the United States whether the Court used state law or federal common law.

The Secretary has the ability to prevent a lease from falling into the hands of someone who should not have it. The Secretary's determination that a lease or an assignment of a lease meets the requirements of the Act evidences compliance with the rules and regulations protecting the interests of the United States. That determination is unquestionably a federal matter. But the rights of action, if any, of McKenna and Pan-American against Wallis are state-created. And their validity or invalidity is determinable without regard to the Act, the regulations, or the Secretary's approval. In short, here, as in tax law or in federal procedure or in many other areas of the law where the nature of a litigant's interest unquestionably is important to the federal government—absent a conflict between the State and the Nation, accepted principles of federalism recognize that state law should determine the nature of the litigant's property interest, and federal law

should determine the federal rules applicable to that particular type of property ownership.[13]

The Court's reasoning seems to overlook McKenna. McKenna claimed as a joint venturer, not as an assignee. I do not see how his claim can be lumped with Pan-American's claim. If the reference in the Act to secretarial approval of options and assignments makes a federal matter of all litigation touching such contracts, the statutory silence with respect to joint ventures should be taken to mean that McKenna's alleged joint venture with Wallis is not a federal matter. I do not underscore this point. I mention it only to demonstrate that no special federal significance should be attached to the mention of "options" and "assignments" when it is manifest that the Secretary's approval of all original leases and all transfers is required under the Act.

IV.

After finding that the plaintiffs' claims were "federal matters," the Court still could not fashion and apply federal common law without first holding that application of state law would seriously affect adversely the interests

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[13] Professor Hart comments: "But the decisions yield no simple rule of thumb for choosing. They cannot. Particularly is this so in the subtler situations in which federal legislation is building upon legal relationships established by the states and its power is one of characterization only and not of alteration of the substance of the relation. Federal tax law, for example, can say what state-created interests are to be taxed, and can characterize them in any way it chooses; but it cannot create the interests. Similarly, federal bankruptcy law can dissolve state-created interests in any way it thinks equitable; but it is hard to see how it can create, or recognize in liquidation, interests which never had any existence under state law." Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 535 (1954).

of the United States. The Court managed this conclusion in just one sentence:

> "We do not think the use of these devices [assignments and options] as a part of the scheme of carrying forth this public policy [the development of our mineral resources and increasing our domestic reserves] should be limited by the interstitial restrictions imposed by the law of the State of Louisiana, which are not present in the other states."

The fact is, Louisiana imposes no special limitations, interstitial or otherwise, on assignments and options. Louisiana does require, as do common law states, that all contracts affecting immovables (real property), including mineral leases, be in writing. The Statute of Frauds is no stranger to the common law. The only pertinent Louisiana limitation affecting mineral leases is the rule against resulting and constructive trusts. This established civilian principle,—as a practical matter, a principle rarely called into operation—is the sole and narrow basis for the Court's holding that if state law is applied the Nation will suffer.

If this one-sentence finding on which the Court's decision rests is corrected and paraphrased realistically, the holding shakes down to this bizarre result:

> Trusts ex maleficio are part of the congressional scheme for carrying out the national policies on mineral resources and monopoly. In litigation between private persons over the nature of the ownership of a federal mineral lease, as among themselves, national policies on mineral resources and monopoly will suffer unless courts recognize beneficial title to the lease in a claimant whom the Secretary has

> not investigated, has not approved as lessee, and may be unknown to the Secretary.

To restate this holding in accurate, realistic terms is to expose the unreal, speculative character of the Court's notion that federal common law controls this case.

V.

I find no decisional and no doctrinal support in the majority's position. I turn now to a small sampling of leading cases.

Clearfield Trust Co. v. United States, 1943, 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838, was the Supreme Court's first important decision on federal common law after *Erie*. The United States sued to recover on an express guaranty of prior endorsements on a government check containing a forged endorsement. The court held that state law was inapplicable. The United States was a party to the litigation, but more importantly since the right of the United States to recover for conversion of a government check is a federal right, the courts of the United States could properly formulate a rule of decision. Uniformity was desirable; state law would be "singularly inappropriate" because its application to commercial paper of the United States "would subject the rights and duties of the United States to exceptional uncertainty".

Mr. Justice Douglas, author of the *Clearfield* opinion has recently cast some doubt on its scope:

> As respects the creation in the federal court of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating

Erie R. Co. v. Tompkins, 304 U.S. 64. *The instances where we have created federal common law are few and restricted.* In Clearfield Trust Co. v. United States, 318 U.S. 363, we created federal common law to govern transactions in the commercial paper of the United States; and we did so in view of the desirability of a uniform rule in that area. Id., p. 367. But even that rule was qualified in Bank of America v. Parnell, 352 U.S. 29. (Emphasis supplied.) *Wheedlin v. Wheeler*, 1963, 373 U.S. 647, 83 S. Ct. 1441, 10 L. Ed. 2d 605.

This brings us to *Bank of America National Trust and Savings Association v. Parnell*, 1956, 352 U.S. 29, 77 S. Ct. 119, 1 L. Ed. 2d 93, one of the two authorities cited in the opinion on rehearing for the majority's principal holding. As in the instant case, *Parnell* was a diversity action between private persons. The suit was over stolen bearer bonds (in a general sense analogous to the lease here) issued by the Homeowners Loan Corporation, a federal agency, and guaranteed by the United States. The Bank sued to recover the value of the bonds Parnell had cashed. The Court held that federal law controlled the question whether the bonds were "overdue", because it related to the nature of the rights and duties of the Government. But the Court held also that state law controlled the question whether Parnell had met the burden of proving good faith. "Government securities" generate immediate interests of the Government, but the "present litigation is purely between private persons and does not touch the rights and duties of the United States". The possibility that "the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter

. . . is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern". 352 U.S. at 33. See Wright, Federal Courts, § 60 at 216 (1963). Parnell is clearly contrary to the majority opinion.

Free v. Bland, 1962, 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180, turned on a specific Treasury regulation designed to make savings bonds attractive to purchasers by a survivorship provision eliminating the necessity for expensive or time-consuming probate proceedings. To allow state law to frustrate this purpose would permit the states to constrict money designed to help the federal treasury borrow money. In line with *Clearfield* and *Parnell*, the Court applied federal law. The Court made the following comment on *Parnell*, a comment appropriate here:

> "[T]hat case [Parnell] held that, in the absence of any federal law, the application of state law . . . was permissible, *because the litigation between the two private parties there did not intrude upon the rights and duties of the United States*, the effect on the only possible interest of the United States—the floating of securities—being too speculative to justify the application of federal law."

In *Free v. Bland*, state law conflicted with a distinct federal rule the Treasury had consistently advocated and which supported the paramount interest of the United States.

Although United States was a party in *Clearfield* and its presence in litigation may in some cases be a factor, the principal teaching of *Clearfield*, *Parnell*, and *Free v. Bland*, as a group, is that federal common law is appli-

cable when the state law substantially conflicts with the rights of the United States and where lack of uniformity causes "exceptional uncertainty" in determining the rights and duties of the United States.

Textile Workers Union of America v. Lincoln Mills of Alabama, 1957, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, is not cited in the Court's opinion on rehearing but apparently is implicit in the Court's reliance on interstitial law-making. *Lincoln Mills* involved specific performance of an arbitration clause in a labor contract. Under § 301 of the Taft Hartley Act, federal courts have jurisdiction over suits on labor contracts affecting interstate commerce, although there is no specific provision about enforcing arbitration clauses. The Supreme Court held that § 301 was a mandate to fashion and apply a federal common law governing labor contracts. It should be remembered, however, that specific performance of arbitration agreements was prohibited by the law of Alabama, contrary to the strong congressional policy in favor of enforcement of labor arbitration. "To be consistent with that [congressional] policy you need to have specific performance of the arbitration agreement; that would bolster the policy rather than detract from it; so in this area the issue may be federal, that is, subject to federal common law rather than state law if that issue, though not covered squarely or impliedly by any federal statute or any federal treaty or constitutional provision, nevertheless would substantially affect the policy of such federal law." Morgan, The Future of Federal Common Law, 17 Ala. L. Rev. 10, 14 (1964). Again, as "Judge Rives [has] pointed out, there was behind *Lincoln Mills* a clear discernible federal policy in favor of collective bargaining

agreements" and also "a huge body of federal labor law on which the courts draw in fashioning a substantive body of labor contract law".[14] This is legitimate "interstitial legislation" because of discernible congressional policy. Dean Cowen, more accurately, calls it a "delegation" by Congress to the Judiciary of a portion of its legislative power.[15] There is of course no federal policy touching resulting and constructive trusts of federal mineral leases; no substantial conflict between the state and federal policies; no clear mandate to fashion a federal substantive law of trusts ex maleficio affecting mineral leases.

The other case the Court relies on is *Francis v. Southern Pacific Co.*, 1948, 333 U.S. 445, 68 S. Ct. 611, 92 L. Ed. 798.[16] But *Francis* lends no support to the majority. In *Francis*, the Supreme Court based its decision on the "accepted and well-settled construction of the Act" that the liability of an interstate carrier to one riding on a free pass was determined not by state law but by the Hepburn Act. This construction has been "unchallenged" in the Supreme Court and "in Congress too". The Transportation Act of 1940 reenacted the free pass provisions "without

[14] Morgan, The Future of Federal Common Law, 14 Ala. L. Rev. 10, 31 (1964).

[15] Id. at 17.

[16] A note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1090 (1964) contracts Francis v. Southern Pac. Co. with Regents of the Universal System v. Carroll: "The Supreme Court occasionally has been guilty of failure to inquire into the extent of the interest evinced by a federal statute 'involved' in a litigation. In *Francis v. Southern Pac. Co.*, for example, . . . In contrast with *Francis*, the Court made careful inquiry into the interest evinced by the legislation 'involved' in *Regents of the Univ. Sys. v. Carroll.* There it was held that although the Federal Communications Commission has authority to regulate the transfer of radio licenses, the construction of contracts transferring the control of a station or its property is governed by state law." See also Wright, Federal Courts § 60 at 218.

further change or qualification". The Court said, therefore, that it was "not writing on a clean slate"; "the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation" had become "part of the warp and woof of the legislation." "State law which conflicts with this federal rule governing interstate carriers must therefore give way by virtue of the Supremacy Clause".[17]

The "presence of a federal statute does not necessarily imply that there is a congressional intent that any particular issue be resolved by reference to federal law".[18] The Federal Communications Act is unquestionably a comprehensive statute regulating a subject of national importance in which the United States has an overriding interest. Just as the Mineral Leasing Act regulates the issuance and transfer of federal mineral leases, the Communication Act regulates the issuance and transfer of radio licenses. *Regents of the University System of Georgia v. Carroll*, 1950, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363,

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[17] 333 U. S. at 450.

[18] Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1090 (1964). "Although Congress has in rare instances delegated to the judiciary the authority to create a comprehensive body of decisional law in a particular area, the role of the courts is ordinarily interpretative and implemental. The exercise of this judicial competence is premised on the inevitable incompleteness of legislation. A statute may be sufficiently vague that its application to a particular controversy is unclear; it may have omitted ancillary but necessary procedural rules; or it may have created a cause of action whose elements are defined only in general terms, leaving refinements to the judiciary. In these cases it is the task of the judiciary to fill in the legislative lacunae in the manner most compatible with the statutory framework. The scope of judicial lawmaking varies inversely with the clarity of the policies discernible from the statute and its legislative history, but judicial lawmaking competence is properly limited to issues in which the congressional program evinces a legislative interest." Id. at 1089.

concerned the construction of a contract transferring the licensee's control of its radio station to a broadcasting company. When the licensee repudiated the contract, the broadcasting company sued for an accounting. The Court held that state law governed the relationship between the parties as established by the contract between the parties. The Court's reasoning is clearly applicable to the parallel situation the instant case presents:

> "Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power . . . The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant . . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." 338 U.S. at 600. 602.

Within the scope of its objectives as a mineral leasing law, the Act here is comprehensive and no doubt has many interstices to be filled, in the proper case, by judicial resort to federal common law. But the Act does not purport to go beyond the lessee and lessor. The Secretary, like the Federal Communications Commission, may impose conditions that the lessee must meet, but the Secretary, although interested in disclosure of the nature of the lessee's interest, has not tried to affect the legal relationship of the lessee to third parties. The controversy between the litigants, as it did in *Carroll*, takes place outside the Act, not within an interstice of the Act.

The only case squarely in point is *Blackner v. McDermott*, 10 Cir. 1949, 176 F. 2d 498, which the Court noted as "involving a claim of 'joint venture' highly similar to McKenna's claim here", but declined to follow. The Tenth Circuit applied the law of Wyoming for the reason I would apply the law of Louisiana: the issue was "the relationship of the parties each to the other in respect of the leasehold estate".

Decisions in this circuit in the area of federal decisional law are not distinguished for their consistency.

In *United States v. Sylacauga Properties, Inc.*, 5 Cir., 1963, 323 F. 2d 487, we held that state law was inapplicable in a suit to foreclose an FHA mortgage under the National Housing Act. See also *United States v. Taylor*, 5 Cir. 1964, 333 F. 2d 633, holding that federal law rather than state law applies to the interpretation of a disputes clause in a contract between private parties where there is a sufficient federal interest. The federal interest was in controlling and effecting prompt settlement of disputes between a sub-contractor and a prime contractor engaged in construction work for the Atomic Energy Commission. But see *United States v. Yazell*, 5 Cir. 1964, 334 F. 2d 454, an action to recover on a note for a loan from the Small Business Administration. This Court held, surprisingly, perhaps, that the capacity of a married woman to contract with the federal government is controlled by state law, notwithstanding the effect such a decision might have on the administration of the national program for assistance to small business.

Leiter Minerals, Inc. v. United States, 5 Cir. 1964, 329 F. 2d 85; affirmed subject to abstention, 1957, 352 U.S.

220, 77 S. Ct. 287, 1 L. Ed 2d 267, cannot be reconciled with the majority's holding in the instant case. In 1935, the United States, acting under the Migratory Bird Conservation Act, contracted to purchase almost 9000 acres of land in south Louisiana. The seller reserved the minerals for a ten-year period with provisions for extensions of five years so long as certain minimum use was made of the rights. In Louisiana the sale or reservation of mineral rights establishes only a servitude or right to extract the minerals. Servitudes prescribe in ten years for nonuse, a prescription that cannot be avoided by contract. In 1938, before the conveyance, the Louisiana legislature adopted a statute providing that prescription of mineral rights should not run against the State or United States. This legislation was replaced by Act 315 of 1940 restricting the exemption to the United States. The Louisiana court held that Act 315 would not apply if the deed provided for a mineral servitude for fixed term, but would apply if the term were indefinite. Leiter Minerals, Inc., successor to the seller of the land, filed suit in 1953 to have itself declared owner of the mineral rights. The United States then filed suit to quiet title. This Court, applying state law, held that the reservation was for an indefinite term. Here, therefore, we have the United States a party to the litigation concerning its rights under a contract entered into pursuant to a federal statute. Directly affected are national policies under that statute, policies relating to the conservation of our national resources, and settled policies of federal land acquisition. Presumably the Government paid more to obtain the favorable term. "It seems reasonable to assume a congressional intent that rights for which the Government has paid not be taken away by operation of special state legislation directed against the United States." Note,

78 Harv. L. Rev. 891, 895 (1965). Finally, the case involved state legal concepts exceptionally complex and foreign to common law concepts. I must say, if federal common law applies in the case now before this Court, *Leiter Minerals, Inc.* was an *a fortiori* case for federal common law. This Court held otherwise:

> "We have no doubt that the Congress could make federal law applicable, but we are equally clear that it had no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of a federal statute making federal law applicable . . . [T]he rules of decision act always has had 'application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.' Swift v. Tyson, 1842, 41 U.S. (16 Pet.) 1, 18, 10 L. Ed. 865." *Leiter Minerals, Inc. v. United States*, 5 Cir. 1964, 329 F. 2d 85, at 90.

In sum, I can find no decisional or doctrinal justification for applying judge-made federal common law to a private dog-fight in which the federal government's interest, if any, seems to me to be that of a bored spectator. The speculation that trusts ex maleficio are part of the congressional scheme for conserving natural resources hangs by too fine a thread for me to see the connection. Under *Erie* and the Rules of Decision Act, Louisiana may decide for itself whether to preserve its civil law institutions or

adopt alien institutions. The philosophy that brought American federalism into being keeps the national government out of local transactions involving only the determination of the nature of the legal relation of one person to another.

LETTER AGREEMENT BETWEEN WALLIS AND McKENNA (ORIGINAL PAPERS—ITEM 20. WALLIS' NOTE OF EVIDENCE)

December 27, 1954

Dear Mr. McKenna:

RE: B L M - A - 0 3 7 4 3 5; 037436; 037437; 0 3 7 4 3 8; 037439.
SOUTHWEST PASS APPLICATIONS

The above captioned serialized numbers represent numbers assigned to oil and gas lease applications made by me (Wallis) to the Bureau of Land Management, Department of the Interior, covering certain lands in Plaquemines Parish, Louisiana. These applications were filed on June 2nd, 1954.

This letter is written to confirm the fact that you have a ⅓ undivided interest in the above captioned oil and gas lease applications and that your ⅓ interest, of course, covers such lease or leases as may be issued to me under these captioned applications, it being understood, however, that all dealings in connection with these leases shall be at my sole discretion and direction.

If this correctly represents our understanding in this matter, I will appreciate if you will sign the copy of this letter in the place provided in the lower left corner and return same to me so that I may complete my file herein.

With kindest regards, I remain

Yours sincerely,

s/ Floyd A. Wallis
Floyd A. Wallis

FAW: bb

APPROVED:

s/ P. A. McKenna—1-3-55.

P. A. McKENNA

OPTION AGREEMENT BETWEEN WALLIS AND PAN AM (ORIGINAL PAPERS—ITEM C., 1, OF PARAGRAPH I OF THE PAN AM NOTE OF EVIDENCE)

STATE OF LOUISIANA:
PARISH OF ORLEANS:

THIS AGREEMENT, made this 3 day of March, 1955, by and between FLOYD A. WALLIS, a resident of the Parish of Orleans, State of Louisiana, hereinafter referred to as "Wallis", and STANOLIND OIL AND GAS COMPANY, a Delaware corporation, hereinafter referred to as "Stanolind".[1]

[1] Subsequent to the execution of this agreement, the corporate name of "Stanolind" was changed to Pan American Petroleum Corporation.

WITNESSETH, That

"WHEREAS, Wallis has heretofore filed with the United States Department of the Interior, Bureau of Land Management, applications for five (5) non-competitive oil and gas leases on acquired lands, which applications have been assigned the following Bureau of Land Management numbers and cover the following described lands in Plaquemines Parish, Louisiana, to-wit:

B.L.M.-A-037435—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 348.80 acres, more or less.

B.L.M.-A-037436—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 19.76 acres, more or less.

B.L.M.-A.-037437—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 182.63 acres, more or less.

B.L.M.-A.-037438—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 221.05 acres, more or less.

B.L.M.-A.-037439—[Metes and Bounds Description Omitted] The above parcel of land is estimated to contain an area of 54.07 acres, more or less.

WHEREAS, Wallis, in consideration of Eight Thousand Three Hundred Dollars ($8,300.00) cash in hand paid, receipt of which is hereby acknowledged, has agreed to grant to Stanolind an option to acquire from Wallis any and all oil and gas leases which he will acquire in the event the said applications are approved and leases issued in response to such applications.

NOW, THEREFORE, in consideration of the premises, the parties hereto do hereby mutually agree by and between themselves as follows:

I.

Wallis does hereby grant to Stanolind the right and option, at Stanolind's election, to acquire any and all oil and gas leases which may be issued to Wallis, his heirs or assigns, under and by virtue of the above referred to applications.

II.

Wallis agrees to make diligent efforts to acquire leases on, to acquire the right to lease all lands described in the above referred to applications and to obtain the issuance of leases to him covering all of said lands.

III.

Wallis shall notify Stanolind in writing at its office in the Pan American Insurance Building, 2400 Canal Street, New Orleans, Louisiana, when leases have been issued to him under said applications and Stanolind shall, within fifteen (15) days after receipt of such notice, advise Wallis whether or not it elects to acquire such lease or leases from him. If Stanolind notifies Wallis that it does not desire to acquire leases from him or fails to notify Wallis of its election to exercise its option within said fifteen (15) day period, Stanolind's right to acquire leases hereunder shall lapse and there shall be no obligation on Wallis to transfer said leases.

IV.

If Stanolind elects to acquire said leases, Wallis agrees to transfer, within ten (10) days thereafter, to

Stanolind all of his right, title and interest in and to said leases, reserving to himself an overriding royalty interest equal to one-eighth of eight-eighths (1/8 of 8/8) for a consideration which, at the election of Wallis, shall be either (a) Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned; or (b) the reservation in Wallis of a production payment in the amount of Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned, payable out of one-thirty-second of eight-eighths (1/32 of 8/8), or (c) a combination of each consideration and production payments out of one-thirty-second of eight-eighths (1/32 of 8/8) at the election of Wallis, which shall total Ninety Dollars ($90.00) per acre for each acre covered by the leases assigned.

V.

It is understood and agreed that there shall be deducted from the one-eighth of eight-eighths (1/8 of 8/8) overriding royalty reserved by Wallis all overriding royalties, production payments, net profits obligations, carried working interest and other payments out of or with respect to production with which the lease acreage is encumbered over and above the lessor's royalty on the date of the assignment to Stanolind. Wallis agrees that the leases shall not be burdened with such interests over and above the lessor's (United States) royalty in excess of the one-eighth of eight-eighths (1/8 of 8/8) to be reserved by him.

VI.

It is agreed that if assignments of leases are made to Stanolind under this agreement, such assignments shall provide that Stanolind shall have the right and power to pool or combine the acreage covered by the leases or any

portion thereof with other land, lease or leases in the immediate vicinity thereof, in any manner provided by said leases, or by law, and in the event of such pooling, Wallis shall receive in lieu of the overriding royalties specified on production from the unit so pooled only such portion of such overriding royalties as the amount of his acreage placed in the unit or his overriding royalty interest thereon on an acreage basis bears to the total acreage so pooled in the particular unit involved.

VII.

The terms, covenants and conditions of the agreement shall be binding and shall inure to the benefit of the parties hereto, the successors and assigns of Stanolind, and the heirs, executors, administrators, personal representatives and assigns of Wallis.

THUS DONE AND SIGNED by the parties hereto in the presence of the undersigned competent witnesses on the day and date first above written.

WITNESSES:

John L. Lippa

Edwin A. Ellingshausen, Jr.

Floyd A. Wallis

STANOLIND OIL AND GAS COMPANY

W. P. Boles

W. C. Imbt

Joan Vehalage

By .....

STATE OF LOUISIANA:
PARISH OF ORLEANS:

Before me, the undersigned Notary Public, on this day personally appeared John L. Lippa, who, being by me duly sworn, stated under oath that he was one of the subscribing witnesses to the foregoing instrument and that the same was signed by FLOYD A. WALLIS in his presence and in the presence of Edwin A. Ellinghausen, Jr., the other subscribing witness.

Sworn to and subscribed
before me this 4th
day of March, 1955.

Henry G. Neyrey, Jr.,
Notary Public

John L. Lippa

STATE OF TEXAS:
COUNTY OF HARRIS:

On this 15 day of March, 1955, before me appeared W. C. Imbt, to me personally known, who, being by me duly sworn, did say that he is the Attorney-in-Fact for STANOLIND OIL AND GAS COMPANY, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and said W. C. Imbt acknowledged said instrument to be the free act and deed of said corporation.

Gertrude Oliver
Notary Public

GERTRUDE OLIVER
Notary Public in and for Harris County,
Texas